

NEW JERSEY DEPARTMENT OF  
**COMMUNITY AFFAIRS**



Local Public and  
Public School Contracts Laws  
Administrative Code  
N.J.A.C. 5:34-1 et seq.

Includes N.J.A.C. 5:30-5.1 et seq. &  
N.J.A.C. 5:30-11.1 et seq.

*(Current as of December 2003)*

New Jersey Department of Community Affairs  
Division of Local Government Services  
*101 South Broad Street PO Box 803*  
Trenton, NJ 08625-0803  
(609) 292-6110  
[www.nj.gov/dca/dlgs](http://www.nj.gov/dca/dlgs)  
[dlgs@dca.state.nj.us](mailto:dlgs@dca.state.nj.us)

**Local Public and Public School Contracts Laws  
Administrative Code  
N.J.A.C. 5:34–1 et seq. &  
N.J.A.C. 5:30-5.1 et seq. – Local Public Contracts Law only  
N.J.A.C. 5:30-11.1 et seq. Local Public Contracts Law only**

<b>Section</b>	<b>Title</b>	<b>Page</b>
1	General Provisions and Definitions	1
2	Extraordinary Unspecifiable Services	4
3	Certain Leases of Equipment and Service Agreements Beyond the Fiscal Year	6
4	Administration of Competitive Contracting Process	7
5	Qualified Purchasing Agents and Increasing the Bid Threshold	12
6	Emergency Purchases and Contracts	15
7	Cooperative Purchasing	16
8	Contracts Subject to Public Bidding	34
9	Special Circumstances	37
	Appendix A	45
	Appendix B	48
	Appendix C	50
5:30-5.1 et seq.	Encumbrance Accounting and Certification of Availability of Funds	52
5:30-11.1 et seq.	Change Orders and Open-End Contracts	58

## SUBCHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

### 5:34-1.1 Application and compliance

- (a) Unless specifically stated to the contrary, the rules in this chapter apply to all local government agencies that are encompassed by the definition of contracting unit in N.J.S.A. 40A:11-2(1), and by all boards of education meeting the definition of board of education in N.J.S.A. 18A:18A-2a by whatever name called.
- (b) Every governing body, chief executive officer, or chief school administrator shall take reasonable steps to provide training so that all officials and employees responsible for the administration of public contracts are aware of and are able to comply with the requirements of the law and these rules.
- (c) These rules are adopted by the Director of the Division of Local Government Services after consultation with the Commissioner of Education pursuant to N.J.S.A. 40A:11-37.1 and 18A:18A-49.2.
- (d) Public housing authorities that operate subject to the authority of the U.S. Department of Housing and Urban Development will adhere to procurement procedures which reflect N.J.S.A. 40A:11-1 et seq. and related rules, provided that procurements conform to applicable Federal law and the standards required therein and to 24 CFR 85.36(b) that requires where both State and Federal law encompass the same procurement, the stricter or more limiting procedure which encourages competition shall be used.

### 5:34-1.2 Definitions

The following words and terms, as used in this chapter, shall have the following meanings, unless the context indicates otherwise:

*"Aggregate"* or *"aggregation"* means the sums expended or to be expended for the provisions or performance of any goods or services in connection with the same immediate purpose or task, or the furnishing of similar goods or services, during the same contract year through a contract awarded by a contracting agency.

*"Bid threshold"* means the dollar amount set in N.J.S.A. 40A:11-3, and in N.J.S.A. 18A:18A-3, above which a contracting unit shall advertise for and receive sealed bids

*"Board of education"* means and includes the board of education of any local school district, consolidated school district, regional school district, educational services commission, county special services school district, county vocational school and any other board of education or other similar body other than the State Board of Education, the Commission on Higher Education or the Presidents' Council, established and operating under the provisions of Title 18A of the New Jersey Statutes and having authority to make purchases and to enter into contracts for the provision or performance of goods or services. The term "board of education" also shall include the board of

trustees of a charter school established under P.L. 1995, c.426 (N.J.S.A. 18A:36A-1 et seq.).

"*Competitive contracting*" means the method described in N.J.S.A. 40A:11-4.1 et seq. and 18A:18A-4.1 et seq. of contracting for specialized goods and services in which formal proposals are solicited from vendors.

"*Concession*" means the granting of a license or right to act for or on behalf of the contracting unit, or to provide a service requiring the approval or endorsement of the contracting unit, and which may or may not involve a payment or exchange, or provision of services by or to the contracting unit.

"*Contract*" means any agreement, including, but not limited to, a purchase order or a formal agreement, which is a legally binding relationship enforceable by law, between a vendor who agrees to provide or perform goods or services and a contracting unit which agrees to compensate a vendor, as defined by and subject to the terms and conditions of the agreement. A contract also may include an arrangement whereby a vendor compensates a contracting unit for the vendor's right to perform a service, such as, but not limited to, operating a concession.

"*Contracting agent*" means the governing body of a contracting unit or its authorized designee that has the power to prepare the advertisements, to advertise for and receive bids and, as permitted by law, to make awards for the contracting unit in connection with contracts.

"*Contracting unit*" means: any county; municipality; school district; or any board, commission, committee, authority or agency, which is not a State board, commission, committee, authority or agency, and which has administrative jurisdiction over any district project, or facility, included or operating in whole or in part, within the territorial boundaries of any county or municipality which exercises functions which are appropriate for the exercise by one or more units of local government, and which has statutory power to make purchases and enter into contracts awarded by a contracting agent for the provision or performance of goods or services.

"*Contract year*" means the period of 12 consecutive months following the award of a contract.

"*Director*" means the Director of the Division of Local Government Services in the Department of Community Affairs.

"*Division*" means the Division of Local Government Services in the Department of Community Affairs.

"*Extraordinary unspecifiable services*" or "*EUS*" means services which are specialized and qualitative in nature requiring expertise, extensive training and proven reputation in the field of endeavor.

"*Goods and services*" or "*goods or services*" means any work, labor, commodities, equipment, materials, or supplies of any tangible or intangible nature, except real property or any interest therein, provided or performed through a contract awarded by a contracting agent, including goods and property subject to N.J.S.A. 12A:2-101 et seq.

"*Governing body*" means: the governing body of the county, when the purchase is to be made or the contract is to be entered into by, or in behalf of, a county; the governing body of the municipality, when the purchase is to be made or the contract is to be entered into by, or on behalf of, a municipality; a board of education, when the purchase is to be made or the contract is to be entered into by, or on behalf of, a school district; or any board, commission, committee, authority or agency of the character described in definition of contracting unit.

"*Lowest price*" means the least possible amount that meets all requirements of the request of a contracting agent.

"*Lowest responsible bidder or vendor*" means the bidder or vendor:

1. Whose response to a request for bids offers the lowest price and is responsive; and
2. Who is responsible.

"*Multi-year contract*" means a contract or other agreement operating in excess of 12 consecutive months.

"*Official newspaper*" means any newspaper designated by the contracting unit pursuant to N.J.S.A. 35:1-1 et seq.

"*Purchase*" means a transaction, for a valuable consideration, creating or acquiring an interest in goods, services and property, except real property or any interest therein.

"*Purchase order*" means a document issued by the contracting agent authorizing a purchase transaction with a vendor to provide or perform goods or services to the contracting unit, which, when fulfilled in accordance with the terms and conditions of a request of a contracting agent and other provisions and procedures that may be established by the contracting unit, will result in payment by the contracting unit.

"*Purchasing agent*" means the individual duly assigned the authority, responsibility, and accountability for the purchasing activity of the contracting unit, and who has such duties as are defined by an authority appropriate to the form and structure of the contracting unit; or in the case of a board of education, the secretary, business administrator or the business manager of the board of education duly assigned the authority, responsibility and accountability for the purchasing activity of the board of education and having the power to prepare advertisements, to advertise for and receive bids and to award contracts as permitted by N.J.S.A. 18A:18A-1 et seq., but if there be no secretary, business administrator or business manager, such officer, committees or employees to whom such power has been delegated by the board of education.

"*Professional services*" means services rendered or performed by a person authorized by law to practice a recognized profession, whose practice is regulated by law, and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Professional services may also mean services rendered in the provision or performance of goods or services that are original and creative in character in a recognized field of artistic endeavor.

"*Public works*" means building, altering, repairing, improving or demolishing any public structure or facility constructed or acquired by a contracting unit to house local government or school district functions or provide water, waste disposal, power, transportation (but not the contracting for transportation services), and other public infrastructures.

"*Remaining amount*" means the value of similar goods and services that are needed for the remainder of the current contract year, plus those similar goods and services to be needed in the subsequent contract year.

"*Responsible*" means able to complete the contract in accordance with its requirements, including, but not limited to, requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit, and workforce, equipment, and facilities availability.

"*Responsive*" means conforming in all material respects to the terms and conditions, specifications, legal requirements, and other provisions of the request.

"*Service or services*" means the performance of work, or the furnishing of labor, time, or effort, or any combination thereof, not involving or connected to the delivery or ownership of a specified end product or goods or a manufacturing process. Service or services may also include an arrangement in which a vendor compensates the contracting unit for the vendor's right to operate a concession.

## **SUBCHAPTER 2. EXTRAORDINARY UNSPECIFIABLE SERVICES**

### **5:34-2.1 Use of extraordinary unspecifiable services**

N.J.S.A. 40A:11-5(1)(a)ii and 18A:18A-5a(2) permit contracting units to award contracts without competitive bidding for extraordinary unspecifiable services. The application of this exception for extraordinary unspecifiable services shall be construed narrowly in favor of open competitive bidding wherever possible.

### **5:34-2.2 General requirements limiting the use of the exception**

(a) The assertion that the service can only be provided by a single contractor ("sole source") shall not be sufficient to justify avoidance of competitive bidding as an extraordinary, unspecifiable service (hereinafter referred to as EUS).

(b) The fact that the service is in the nature of a personal, human, social or training services contract, or includes within its description such terms as "technical," "management," "consultant," or similar descriptions suggesting some special nature shall not in itself be sufficient to utilize this exception. The need for expertise, extensive training and proven reputation in the field of endeavor must be critical and essential to the project, and not merely a desire to have a reliable job performed.

(c) The services must be of such a qualitative nature that the performance of the services cannot be reasonably described by written specifications. However, services

previously bid or generally characterized as being of a continuous ongoing nature shall be subject to the presumption that such services may not be classified as an EUS, unless a contracting unit can demonstrate in writing its inability to prepare written specifications describing the qualitative nature of the performance of the services required. If written specifications can be prepared describing the qualitative nature of the performance of the services, then they shall be so written, but notwithstanding that the other criteria of the definition may be met. Contracting unit officials might also consider the use of competitive contracting pursuant to N.J.S.A. 40A:4.1(k) or 18A:18A-4.1(k).

(d) Services that meet the requirements of EUS may not be combined with other work in a contract which is predominantly characterized as being a biddable activity so as to avoid the necessity of bidding for the work which in its own right is subject to competitive bidding.

(e) No firm, having been previously retained under this exception to study, survey or prepare specifications for a given system, function or equipment, may be selected without competitive bidding to operate, implement or provide any material or services on the basis of intimate or specialized knowledge acquired as a result thereof. Appropriate care shall be taken so that such a firm is not authorized to participate in competitive bidding or competitive contracting if its earlier participation would give it unfair advantage.

### **5:34-2.3 Procedures for implementation of the exception**

(a) If the estimated cost or price exceeds the 15 percent of the bid threshold of N.J.S.A. 40A:11-6.1a or 18A:18A-37a, quotations as to the cost or price must be solicited by the contracting agent whenever practicable, and the contract shall be awarded in accordance with the requirements of N.J.S.A. 40A:11-6.1a or 18A:18A-37a.

(b) Before the governing body awards a contract under the EUS provisions which exceeds the bid threshold established in accordance with N.J.S.A. 40A:11- 6.1b or 18A:18A-37b, a designated administrative official of the contracting unit must file a certificate with the governing body clearly describing the nature of the work to be done, stating that it is not reasonably possible to draft specifications, describing the informal solicitation of quotations, and describing in detail why the contract meets the provisions of the statute and these rules. A mere recitation of the language in the statute shall not be sufficient for this purpose. A standard certification format is available from the Division of Local Government Services and must be utilized. The certification must be kept with the resolution awarding the contract.

(c) The governing body, in addition to stating the supporting reasons for its action in the resolution awarding the contract, shall place a notice of the action in an official newspaper pursuant to N.J.S.A. 40A:11-5(1)(a) and 18A:18A-5(a)(2).

### **5:34-2.4 (Reserved)**

### **SUBCHAPTER 3. CERTAIN LEASES OF EQUIPMENT AND SERVICE AGREEMENTS BEYOND THE FISCAL YEAR**

#### **5:34-3.1 Duration of contract**

(a) Leases (which term includes rental agreements) and service agreements for items authorized by N.J.S.A. 40A:11-15(7) and 40A:11-15(15) or N.J.S.A. 18A:18A-42(f) shall not be renewed or extended beyond the number of years set forth in each such statutory provision. The specifications for rebidding after the maximum number of years should not require that the equipment be in the possession or service of the contracting unit.

(b) Such leases and service agreements may be written for any period of time not to exceed the maximum statutory period, or for shorter periods with provision for renewal at the option of the contracting unit, provided that such renewal shall not cause the cumulative length to exceed the permitted length of time. Such renewals may be authorized only by resolution of the governing body.

#### **5:34-3.2 Application of bidding requirements**

(a) All multi-year contracts, including all multi-year leases and multi-year leases with option to purchase, which are authorized under N.J.S.A. 40A:11-15(7), 40A:11-15(15) or 18A:18A-42(f), and other multi-year contracts subject to N.J.S.A. 40A:11-15 and 18A:18A-42 for the procurement of goods or services shall be subject to competitive bidding if the cumulative amount to be expended during the duration of the multi-year lease or contract exceeds the threshold for competitive bidding for the contracting unit.

(b) Change orders to reflect price increases shall not be required for purchases that are part of a contract where the bid specifications included provisions for price changes based on an objective benchmark not under the direct control of the supplier.

(c) Leases of textbooks and services incidental thereto may be made, negotiated or awarded by a board of education without public advertising for bids.

#### **5:34-3.3 Option to purchase, prohibitions, cancellation clause**

(a) In addition to providing for the use of equipment during the period of the lease, the lease may provide for rental payments to be credited towards the purchase price for purpose of acquisition of the equipment if the contracting unit, at its sole option, decides to buy the equipment, and said option was included in the original specifications and in the original contract.

(b) Leases shall not, however, provide for the acquisition of ownership at the beginning of the lease term, with installment payments to be made thereafter.



(c) If the contracting unit anticipates that a lessor may desire to assign its right to receive lease payments to an outside non-contractual third party, provision for such assignment must have been permitted by the lease specifications and be included in the lease agreement, and the lessee must be notified in writing by the lessor before payments may be made to a third party pursuant to such an assignment.

(d) While N.J.S.A. 40A:11-15 and 18A:18A-42 authorize lease arrangements, such contractual arrangements must contain a clause making them subject to the availability and appropriation annually of sufficient funds as may be required to meet the extended obligation, or contain an annual cancellation clause.

#### **5:34-3.4 Equipment changes**

(a) Equipment leased shall not be expanded, upgraded or otherwise materially changed or increased in cost during the term of the lease without competitive bidding, except as follows:

1. Equipment changes which were specifically described, either by itemization or by performance standards, in the original bidding specifications and for which all bidders were requested to submit bid proposals, when in accordance with a formal written plan of time-phased expansion, prepared prior to solicitation of bids, and when the bid proposals for such changes were considered in the determination of the successful bidder; or
2. An item of equipment which is discontinued by the vendor may be replaced with a comparable model which performs the same or increased workload provided that neither the workload nor the cost exceeds that specified in the original contract or the plan of expansion referred to in (a)1 above.

(b) Any such changes made in accordance with this section shall be made by an amendatory contract and the procedure followed shall be in compliance with the regulations regarding change orders.

### **SUBCHAPTER 4. ADMINISTRATION OF COMPETITIVE CONTRACTING PROCESS**

#### **5:34-4.1 Definitions**

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

*"Administrator"* means:

1. In the case of a municipality, a municipal administrator appointed pursuant to N.J.S.A. 40A:9-136 and N.J.S.A. 40A:9-137; a business administrator, a municipal manager or a municipal administrator appointed pursuant to the

- Optional Municipal Charter Law, P.L. 1950, c.210 (N.J.S.A. 40:69A-1 et seq.); or a municipal manager appointed pursuant to the municipal manager form of government law. N.J.S.A. 40:79-1 et seq.;
2. In the case of a county, an individual appointed pursuant to N.J.S.A. 40A:9-42, 40:41A-42, 40:41A-47, or 40:41A-82; or
  3. In the case of an authority as defined in the Local Authorities Fiscal Control Law, P.L. 1983, c.313 (N.J.S.A. 40A:5A-1 et seq.), a full time professional employee of the authority found by the governing body to possess the experience and skill necessary to properly administer the competitive contracting process.
  4. In the case of a school district, the administrator shall be defined pursuant to N.J.S.A. 18A:18A-4.3b.

"*Authorized agent*" means a qualified purchasing agent, legal counsel, or administrator of a contracting unit using competitive contracting in accordance with this subchapter.

#### **5:34-4.2 Model evaluation criteria**

(a) The following, as appropriate to individual circumstances, shall be used as criteria for evaluating requests for proposals (RFPs) under the competitive contracting process described in N.J.S.A. 40A:11-4.1 et seq. and 18A:18A-4.1 et seq. These criteria are not intended to be limiting or all-inclusive, and they may be adapted or supplemented in order to meet a contracting unit's individual needs as competitive contracting may dictate. No criteria shall unfairly or illegally discriminate or exclude otherwise capable vendors.

1. Technical criteria:

i. Proposed methodology:

- (1) Does the vendor's proposal demonstrate a clear understanding of the scope of work and related objectives?
- (2) Is the vendor's proposal complete and responsive to the specific RFP requirements?
- (3) Has the past performance of the vendor's proposed methodology been documented?
- (4) Does the vendor's proposal use innovative technology and techniques?

ii. Are sound environmental practices such as recycling, energy efficiency, and waste reduction used?

2. Management criteria:

i. Project management:

- (1) How well does the proposed scheduling timeline meet the contracting unit's needs?

- (2) Is there a project management plan?
  - ii. History and experience in performing the work:
    - (1) Does the vendor document a record of reliability of timely delivery and on-time and on-budget implementation?
    - (2) Does the vendor demonstrate a track record of service as evidenced by on-time, on-budget, and contract compliance performance?
    - (3) Does the vendor document industry or program experience?
    - (4) Does the vendor have a record of moral integrity?
  - iii. Availability of personnel, facilities, equipment and other resources:
    - (1) To what extent does the vendor rely on in-house resources vs. contracted resources?
    - (2) Are the availability of in-house and contract resources documented?
  - iv. Qualification and experience of personnel:
    - (1) Documentation of experience in performing similar work by employees and when appropriate, sub-contractors?
    - (2) Does the vendor make use of business capabilities or initiatives that involve women, the disadvantaged, small and/or minority owned business establishments?
    - (3) Does the vendor demonstrate cultural sensitivity in hiring and training staff?
3. Cost criteria:
- i. Cost of goods to be provided or services to be performed:
    - (1) Relative cost: How does the cost compare to other similarly scored proposals?
    - (2) Full explanation: Is the price and its component charges, fees, etc. adequately explained or documented?
  - ii. Assurances of performance:
    - (1) If required, are suitable bonds, warranties, or guarantees provided?
    - (2) Does the proposal include quality control and assurance programs?
  - iii. Vendor's financial stability and strength:
    - (1) Does the vendor have sufficient financial resources to meet its obligations?

**5:34-4.3 Opening and evaluating proposals and awarding competitive contracts**

- (a) The request for proposals document shall state the time and place for receiving and opening the proposals, and shall specify the criteria that will be used to evaluate proposals.
- (b) At the time and place proposals are due, the names of all the vendors and the price of their respective proposals shall be announced in public. Prior to opening such proposals, the authorized agent shall, if not provided as part of the request for proposals document, describe the specific weighting of any evaluation criteria, which may be used for evaluating the proposals.
- (c) The evaluation of request of proposals shall be subject to the following requirements:
1. The request for proposals document shall state the criteria for evaluating the proposals.
  2. Where not otherwise required to do so by other applicable Federal, State and local regulations, the authorized agent may appoint a committee to assist in the evaluation of the proposals. Committees shall be subject to the following requirements:
    - i. If a committee is to be used, the names of the individuals who serve as committee members shall not be publicly disclosed until the evaluation report is presented to the governing body. Committee members shall be familiar with the need for the goods to be provided or the services to be performed in the request for proposals.
    - ii. Committee members may conduct their work separately or together.
    - iii. While a member of the governing body is not required to be a committee member, no more than one less than the majority of the current membership of the governing body may serve on a committee.
    - iv. The committee may use advisors, as it deems necessary to give opinions on evaluating proposals, except that the advisors shall be subject to the provisions of (e) below. The names of such advisors shall be included in the report submitted to the governing body.
    - v. Meetings of the committee are advisory in nature and are not subject to the Open Public Meetings Act, N.J.S.A. 10:4-1 et seq.
  3. At the option of the contracting unit, the request for proposals document may, after proposals are received and opened, but prior to completing the evaluation of the proposals, provide the opportunity for vendors to provide clarification

regarding their submission. The presentation shall address only those matters specified by the contracting unit. The presentation shall not be used for negotiation of a contract contrary to law.

- (d) The process of establishing weighting criteria and evaluating proposals shall result in a finding that a specific proposal is the most advantageous, price and other factors considered, or that all proposals should be rejected.
- (e) Before reviewing any proposals, each person evaluating a proposal shall assess their own affiliations and financial interest and those of their families that relate to their duties as someone evaluating a proposal to ensure they do not have a conflict of interest. For these purposes, a person has a conflict of interest with a proposal if that person or spouse, parent, or child would be in violation of the Local Government Ethics Law, N.J.S.A. 40A:9- 22.1 et seq., or the School Ethics Act, N.J.S.A. 18A:12-21 et seq. as appropriate. Any person with a conflict of interest related to the competitive contracting proposal shall not participate in the evaluation process.
- (f) Prior to evaluating the proposals, each individual participating in the evaluation of a proposal shall execute a statement in accordance with (e) above certifying they do not have a conflict of interest. Such statement shall reflect the provisions at (e) above, which relate to possible conflict of interest situations. This statement shall be filed with the authorized agent, prior to the beginning of the evaluation process. The certification shall be as follows:

I hereby certify that I have reviewed the conflict of interest standards in the Local Government Ethics Law or the School Ethics Act, as appropriate, and that I do not have a conflict of interest with respect to the evaluation of this proposal. I further certify that I am not engaged in any negotiations or arrangements for prospective employment or association with any of those submitting proposals or their parent or subsidiary organization.

**5:34-4.4 Use of competitive contracting for non-listed services**

- (a) The authorized agent shall apply to the Director for approval to use the provisions of N.J.S.A. 40A:11-4.1k and 18A:18A-4.1k requesting the use of competitive contracting for the operation, management, or administration of services not otherwise listed in N.J.S.A. 40A:11-4.1a through j and 18A:18A- 4.1a through j. The application shall be in letter form and shall provide the information reasonably required for the Director to respond to the request. If the Director finds that the subject matter of the application is consistent with the intent of the statutory provisions encouraging competitive contracting, then the Director shall approve the request. The Director may consider the level and characteristics of the service and competition in the market. Prior to submitting an application, an applicant may request to consult with the Director or designee to review issues regarding a potential application.
- (b) Services that meet the requirements for procurement through competitive contracting may not be combined or included in a contract with other services which are

required to be procured through competitive bidding so as to avoid the statutory obligation for the procurement of such other services through competitive bidding.

#### **5:34-4.5 Use of competitive contracting for energy services**

(a) For the purposes of N.J.S.A. 40A:11-4.1c and 18A:18A-4.1c, the "provision or performance of the physical improvements that result in energy services" for which competitive contracting shall not be used, includes the following:

1. The replacement or upgrading of lighting fixtures;
2. The replacement or upgrading of windows;
3. Outside and/or inside doors;
4. The replacement or upgrading of toilets and sinks;
5. The replacement or upgrading of roofs;
6. New boilers;
7. Electrical box upgrades;
8. Cafeteria equipment (that is, freezers and fryers, etc); and
9. Any combination of the above mentioned equipment or work in a single contract.

(b) The work described in (a) above shall be permitted as competitive contracting under the energy services company exemption of N.J.S.A. 40A:11- 4.1c and 18A:18A-4.1c only if the goods and services are part of a comprehensive energy services design, plan or specification for which a single contractor will be responsible for the performance of the work.

### **SUBCHAPTER 5. QUALIFIED PURCHASING AGENTS AND INCREASING THE BID THRESHOLD**

#### **5:34-5.1 Qualified purchasing agent**

(a) A contracting unit's purchasing agent shall be considered qualified pursuant to N.J.S.A. 40A:11-9b to exercise the supplemental authority as set forth in N.J.S.A. 40A:11-3 and 40A:11-4.3 or N.J.S.A. 18A:18A-3 and 18A:18A-4.3 if the following criteria are met:

1. The individual has served as purchasing agent as defined in N.J.A.C. 5:34-1.2; and
  - i. Held the power to award contracts as allowed by law; and
  - ii. Personally performed duties that included, but were not limited to: preparing or reviewing bid specifications, evaluating bids,

seeking or authorizing the solicitation of quotations, recommending or awarding contracts, and analyzing procurement needs on a regular basis; and

2. The individual served as a purchasing agent within 15 years immediately preceding the filing of the application to be a qualified purchasing agent and meets at least one of the following standards of qualifications and experience in contracting units under the jurisdiction of the Local Public Contracts Law or Public School Contract Law:
  - i. Ten years experience as a purchasing agent in New Jersey and has successfully completed Municipal Finance Administration as offered by the Rutgers Center for Government Services;
  - ii. Seven years experience as a purchasing agent in New Jersey and is the holder of a Certified Municipal Finance Officer or Certified County Finance Officer certificate issued by the Division of Local Government Services, or is the holder of a Registered Public Purchasing Specialist certification issued by the Rutgers Center for Government Services;
  - iii. Without regard to service as a purchasing agent, is the holder of a Registered Public Purchasing Official certificate issued by the Rutgers Center for Government Services, or is the holder of a Certified County Purchasing Official certificate issued by the Division of Local Government Services;
  - iv. Three years experience as a purchasing agent in New Jersey and:
    - (1) Holds a certification as a Certified New Jersey School Business Administrator; or
    - (2) Is a school board manager or school board secretary who is grandfathered, pursuant to N.J.A.C. 6:11-9.7;
  - v. Without regard to the number of years as a purchasing agent, has successfully completed 30 hours of training in New Jersey procurement law, and has successfully completed Municipal Finance Administration as offered by the Rutgers Center for Government Services and, is either:
    - (1) Certified as a Certified Public Purchasing Official or a Certified Public Procurement Buyer by the National Institute of Governmental Purchasing; or
    - (2) Certified by the Federal government as a Purchasing Agent; or
  - vi. Without regard to the requirement of experience in a contracting unit, has seven years of experience as purchasing agent in the private sector, has successfully completed 50 hours of training in New Jersey procurement law, and has successfully completed Municipal Finance Administration as offered by the Rutgers Center for Government Services.

(b) Applications for qualified purchasing agent shall be on a form prescribed by the Director and shall include proof(s) of meeting the requirement of a qualified purchasing agent described in this section. Applications may be submitted at any time. There shall be no application fee. At the discretion of the Director, additional documentation may be required upon receipt of an application. Upon approval of the application by the Director, the applicant shall be issued a certificate as a qualified purchasing agent.

(c) Where compliance with (a)2 above included the holding of a professional certificate, the certificate must remain in force during the time the individual serves as a qualified purchasing agent.

### **5:34-5.2 Procedures for increasing the bid threshold**

(a) A contracting unit with a qualified purchasing agent desiring to take advantage of the supplemental authority of N.J.S.A. 40A:11-3 and 40A:11- 4.3 or N.J.S.A. 18A:18A-3 and 18A:18A-4.3 shall have its governing body pass a resolution authorizing the amount of a higher bid threshold for the contracting unit, the amount of which shall not exceed the statutory maximum bid threshold.

(b) A contracting unit that increases the bid threshold pursuant to (a) above shall either:

1. In a contracting unit subject to the Local Public Contracts Law, a certified resolution increasing the bid threshold shall be filed with the Director and shall be accompanied by:
  - i. A certification from the chief executive officer of the contracting unit that the purchasing agent of the contracting unit exercises the duties of a purchasing agent pursuant to N.J.S.A. 40A:11-2(30), with specific relevance to the authority, responsibility, and accountability of the purchasing activity of the contracting unit; and
  - ii. A copy of the contracting unit's purchasing agent's qualified purchasing agent certification; or
2. In a contracting unit subject to the Public School Contracts Law, a certified resolution increasing the bid threshold shall be filed with the Director and shall be accompanied by a copy of the contracting unit's purchasing agent's qualified purchasing agent certification.

### **5:34-5.3 Absence of qualified purchasing agent**

If at any point in time the qualified purchasing agent is unable to exercise the authority, responsibility and accountability of the contracting unit's purchasing function the bid threshold shall revert to the lower statutory bid threshold level not requiring qualified purchasing agent status, pursuant to N.J.S.A. 40A:11-3 and 18A:18A-3, until a qualified purchasing agent is able to assume the purchasing functions.



## **SUBCHAPTER 6. EMERGENCY PURCHASES AND CONTRACTS**

### **5:34-6.1 General requirements**

(a) The use of emergency purchasing pursuant to N.J.S.A. 40A:11-6 or 18A:18A-7 shall be subject to the following requirements:

1. An actual or imminent emergency must exist requiring the immediate delivery of the goods or the performance of the service;
2. As soon as reasonably possible, but within three days of declaring the emergency, the chief school administrator of a board of education shall notify the superintendent of education for the county of the nature of the emergency and the estimated needs for goods and services necessary to respond to it;
3. The emergency purchasing procedure may not be used unless the need for the goods or services could not have been reasonably foreseen or the need for such goods or services has arisen notwithstanding a good faith effort on the part of the contracting unit to plan for the purchase of any goods or services required by the contracting unit;
4. The contract shall be of such limited duration as to meet only the immediate needs of the emergency; and
5. Under no circumstances shall the emergency purchasing procedure be used to enter into a multi-year contract.

(b) The governing body of each contracting unit shall adopt rules or regulations as appropriate to the contracting unit to ensure that there is a procedure for determining and confirming the existence of an emergency and that the provisions for emergency purchasing pursuant to N.J.S.A. 40A:11-6 or 18A:18A-7 may be implemented. Such rules or regulations shall include such provisions that ensure that if initially designated individuals are not available, there is a designated chain of command to ensure that there are always appropriate individuals available to make such decisions.

**5:34-6.2 (Reserved)**

**5:34-6.3 (Reserved)**

## SUBCHAPTER 7. COOPERATIVE PURCHASING

### 5:34-7.1 Applicability and authority

- (a) The rules in this subchapter shall be known as the Cooperative Purchasing Rules.
- (b) These rules shall apply to all contracting units.
- (c) This subchapter is adopted under the authority of P.L. 1999, c. 440 (N.J.S.A. 40A:11-11).
- (d) Copies of all cooperative purchasing forms are available from the Division of Local Government Services at PO Box 803, Trenton, New Jersey 08625-0803 or at the Division's web site at [www.state.nj.us/dca/lgspages/dcadlgs/htm](http://www.state.nj.us/dca/lgspages/dcadlgs/htm).
- (e) When the lead agency of a cooperative pricing system, joint purchasing system or regional cooperative pricing system established and properly registered with the Division is a board of education or educational service commission the provision and performance of goods and services shall be conducted pursuant to the Public School Contracts Law (N.J.S.A. 18A:18A-1 et seq.). All other lead agencies shall follow the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.).
- (f) Boards of education as defined in N.J.S.A. 18A:18A-2 that pursue joint purchasing as described in N.J.S.A. 18A:18A-11 shall be subject to the rules set forth in this subchapter.

### 5:34-7.2 Definitions

The following words and terms used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

*"Application"* means the forms and all supporting documents for creation, amendment or renewal of a cooperative purchasing system.

*"Commodity resale system"* means a purchasing system in which a local contracting unit purchases either gasoline, diesel fuel, snow removal chemicals, public works materials and supplies, including road and roadway construction materials, or any other such materials as may be approved by the Director for its own consumption and then sells all or a portion thereof to another local contracting unit.

*"Contracting unit"* means any county; municipality; board of education; or any board, commission, committee, authority or agency, which is not a State board, commission or committee, authority or agency, and which has administrative jurisdiction over any district, project, or facility, included or operating in whole or in part within the territorial boundaries of any county or municipality which exercises functions which are appropriate for the exercise by one or more units of local government or board of education and which has statutory power to make purchases and enter into contracts awarded by a contracting agent for the provision or performance of goods or services.

"*Cooperative purchasing system*" means a cooperative pricing system, joint purchasing system, commodity resale system, county cooperative contract purchasing system or regional cooperative pricing system which has been approved and registered pursuant to this subchapter.

"*County cooperative contract purchasing system*" means a cooperative purchasing system that shall only be formed by a county and in which the county advertises for bids and awards a contract to the successful vendor.

"*Energy*" means gas supply service or gas related service or electric generation service or electric related service as set forth in the Electric Discount and Energy Competition Act (P.L. 1999, c.23) and the Interim Government Energy Aggregation Program Standards promulgated by the Board of Public Utilities on June 24, 1999.

"*Form CCCP-1917*" means Request For Registration Or Modification of a County Cooperative Contract Purchasing System which contains the following information: action requested; name of the county cooperative contract purchasing system; name of contract, address, and phone number of lead agency; and certification of compliance with N.J.S.A. 40A:11-1 et seq.

"*Form CP-2001*" means Request For Registration Or Modification of a Cooperative Purchasing System which contains the following information: action requested; name of cooperative purchasing system; name of contact, address, and phone number of lead agency; name of participating contracting units affected by request; and certification of compliance with N.J.S.A. 40A:11-1 et seq. and 18A:18A-1 et seq., as appropriate.

"*Form CP-2060*" means a Request for Registration or Modification of a Commodity Resale System which contains the following information: action requested, identification of the lead agency (seller), participating contracting units (purchaser) and commodity being resold.

"*Joint purchasing system*" means a cooperative purchasing system in which the lead agency serves as the purchasing agent for the membership of the system with all of the duties and responsibilities attendant thereto. The lead agency advertises for bids and awards a single contract to a vendor providing for the payment to the contractor for its own needs and for the needs of the participating registered members of the system. The only contractual relationship is between the lead agency and the vendor.

"*Lead agency*" means the contracting unit which is responsible for the management of the cooperative purchasing system.

"*Regional cooperative pricing system*" means a cooperative pricing system composed of two or more registered cooperative pricing systems and their participating contracting units which have agreed to join together for the provision and performance of goods and services, including the purchase of energy.

"*Registered member*" means a contracting unit which has been approved by the Director for participation in a cooperative purchasing system.

"*Snow removal chemicals*" means snow grits, calcium chloride (rock salt), sand or similar substance used for deicing or improving vehicular traction on snow or ice covered roadways.

### **5:34-7.3 Cooperative pricing system or joint purchasing system creation**

- (a) Two or more contracting units may join together to form a cooperative pricing system or a joint purchasing system for the provision and performance of goods and services.
- (b) The contracting unit designated as the lead agency shall authorize the creation of the system by resolution. The authorizing resolution shall identify the system established as either a joint purchasing system or a cooperative pricing system.
- (c) Motions made, carried, and recorded in the written minutes of a business meeting of a board of education shall be considered to be the same as a resolution.

### **5:34-7.4 Cooperative pricing system or joint purchasing system formal agreement**

- (a) A cooperative pricing system or joint purchasing system shall be based on a formal agreement entered into between the lead agency and each contracting unit. Each agreement shall be authorized by resolution.
- (b) At a minimum, the formal agreement shall include the following:
  - 1. Reference to the authorizing statute;
  - 2. Identification of the type of purchasing system;
  - 3. Description of the items of the goods and services to be purchased;
  - 4. The manner of advertising for bids and of awarding contracts;
  - 5. Clear and specific assignment of responsibilities, duties and rights of all contracting units;
  - 6. Provision for any sharing of administrative costs and/or payment for goods and services purchased, together with any necessary standards of performance;
  - 7. Length of the agreement not to exceed 5 years pursuant to N.J.A.C. 5:34-7.5(f);
  - 8. The name of the lead agency for the system:
    - i. As an option, the responsibility of serving as lead agency may rotate, at the most once a year, among the registered members. Provision for this rotation shall be included in the agreement;
    - ii. Rotation of lead agency responsibilities among registered members shall not invalidate contracts or purchase orders with contractors that are in effect at the time of rotation;
    - iii. The Director shall be notified in writing within 30 days of any change in the lead agency; and

9. A requirement that the system identifier shall appear on all documentation related to purchases made through the system, including bidding documents, purchase orders, vouchers, contracts and records.

**5:34-7.5 Cooperative pricing system or joint purchasing system registration**

- (a) A cooperative pricing system or joint purchasing system shall be subject to registration with and approval by the Director.
- (b) The lead agency of a proposed system shall apply to the Director on behalf of the system's participating contracting units.
- (c) Applications shall be made on Form CP-2001.
- (d) The Director shall act upon the application within the time provided for review pursuant to N.J.A.C. 5:34-7.28.
- (e) In reviewing the application, the Director shall utilize the following criteria, as established by N.J.S.A. 40A:11-11:
  1. Provision for maintaining adequate records and orderly procedures to facilitate audit and efficient administration;
  2. Adequacy of public disclosure of such actions as are taken by the participants;
  3. Adequacy of procedures to facilitate compliance with all provisions of the Local Public Contracts Law, Public School Contracts Law and corresponding rules; and
  4. Clarity of provisions to assure that the responsibilities of the respective parties are understood.
- (f) Approval shall be for a period not to exceed five years, and shall be limited to the terms, participants and scope of services presented for approval. Any subsequent changes shall be submitted to the Director on Form CP- 2001.
- (g) The lead agency shall notify the Director in writing of a decision to terminate the registration of the system prior to its approved expiration date.

**5:34-7.6 Cooperative pricing system or joint purchasing system membership registration**

- (a) A contracting unit may apply for membership in an approved cooperative purchasing system by passage of a resolution and executing a formal agreement with the lead agency.
- (b) The lead agency shall apply to the Director for approval on behalf of the proposed new member on Form CP-2001.
- (c) The Director shall act upon the application within the time provided for review pursuant to N.J.A.C. 5:34-7.28.

- (d) Participation in the system for all registered members terminates on the system expiration date assigned by the Director.
- (e) The lead agency shall notify the Director in writing within five days of the withdrawal of any registered member from an approved cooperative purchasing system.
- (f) A registered member which has formally terminated its participation in an approved cooperative purchasing system, may renew its membership by following the procedure defined in this section.
- (g) A registered member of a cooperative purchasing system shall retain membership in a system until the member formally withdraws from participation or the system is dissolved.

**5:34-7.7 Cooperative pricing system or joint purchasing system identifier**

- (a) The Director shall assign an alpha-numeric system identifier to each cooperative pricing system or joint purchasing system at the time of its approval.
- (b) The system identifier shall be included on all bidding documents, purchase orders, vouchers, contracts and records relating to the operations of the approved cooperative purchasing system.

**5:34-7.8 Cooperative pricing system or joint purchasing system renewal**

- (a) Documents requesting the renewal of the registration of a cooperative pricing system or joint purchasing system shall be submitted to the Director for review and approval prior to the date set by the Director for the expiration of the system's registration.
- (b) The lead agency shall authorize the renewal of the system by resolution.
- (c) The lead agency shall apply to the Director on behalf of its membership for system renewal for a period not to exceed five years.
- (d) The renewal application package shall at a minimum include the following:
  - 1. Form CP-2001;
  - 2. Lead agency resolution reauthorizing the system; and
  - 3. A list of the current membership of the System.
- (e) The time for the review-approval period shall commence only upon the determination by the Director that the application for system renewal is complete.
- (f) The lead agency shall notify the Director in writing of a decision not to renew the system's registration.

**5:34-7.9 Cooperative pricing system or joint purchasing system administrative responsibilities**

(a) Upon approval of system registration and annually thereafter either on the anniversary of the registration of the system or in January of each succeeding year, the lead agency shall publish in its official newspaper a notice similar in content to the following:

Notice of Cooperative Purchasing

(Name of lead agency) acts as lead agency in a cooperative purchasing agreement in cooperation with (list number) registered members. Under this system, the (name of lead agency) solicits competitive bids for certain items purchased by registered members. This is a (specify, joint purchasing system or cooperative pricing system) as defined and regulated by N.J.A.C. 5:34-7. Interested citizens or vendors may obtain information regarding the manner of operation of this system by contacting (name, address and phone number of lead agency). System Identifier \_\_\_\_\_, approved by the New Jersey Division of Local Government Services through (expiration date of the system).

- (b) Prior to the advertisement for bids, a registered member may request a review copy of the bid specifications.
- (c) Before seeking bids, the lead agency shall obtain from the registered members:
1. In the case of a joint purchasing system, the exact quantity of goods to be provided or services to be performed that the lead agency shall purchase for the registered members.
  2. In the case of a cooperative pricing system, the estimated quantities that each registered member proposes to contract for during the life of the master contract.
- (d) The lead agency of a joint purchasing system shall disclose in the specifications, the quantities and details of delivery required.
- (e) The lead agency of a cooperative pricing system shall include in the specifications lead agency requirements, stated in definite quantities; and registered member requirements, stated as individual estimated needs.
1. The specification shall list the registered members who have submitted estimates, their delivery address, their estimated maximum quantities and other relevant information to permit the bidder to understand what is potentially involved.
- (f) The lead agency in a joint purchasing system and the individual registered members in a cooperative pricing system shall be responsible for compliance with the change order requirements of N.J.A.C. 5:34-4.
- (g) Each registered member may, by resolution, provide for and authorize payment in advance for estimated administrative costs to be paid to the lead agency for a joint

purchasing or cooperative pricing system. Such administrative costs shall be budgeted by the lead agency as a Special Item of Revenue offset with appropriations.

(h) No contract shall be made by any registered member for a price which exceeds any other price available to the registered member.

**5:34-7.10 Cooperative purchasing system requirement for bids**

(a) Each request for bids shall contain the following:

1. Language requiring uniform bid price(s) for both the lead agency and registered members. A provision with respect to the registered members shall be included substantially as follows:

**REQUIREMENTS OF REGISTERED MEMBERS**

Check here if willing to provide the goods or services herein bid upon to registered members of the (System Name and System Identifier) who have submitted estimates, without substitution or deviation from specifications, size, features, quality, price or availability as herein set forth. It is understood that orders will be placed directly by the registered members identified herein by separate contract, subject to the overall terms of the master contract to be awarded by the (name of the lead agency), and that no additional service or delivery charges will be allowed except as permitted by these specifications.

Check here if not willing to extend prices to registered members of the (System Name and System Identifier) who have submitted estimates as described above. It is understood that this will not adversely affect consideration of this bid with respect to the needs of (name of the lead agency).

2. A statement as to the procedure to be followed in the event that the lowest responsible bidder, in the bid document, declines to extend prices to the registered members who submitted estimates. Examples of such procedures include:
  - i. The contract for the stated needs of the lead agency will be awarded to the lowest responsible bidder, and new bids will be sought and a master contract subsequently awarded with respect to the needs of the registered members who have submitted estimates;
  - ii. The contract for the needs of the lead agency will be awarded to the lowest responsible bidder, and a master contract for the registered members who have submitted estimates will be awarded to the next lowest bidder whose bid agrees to extend prices; or



iii. The contract for the needs of the lead agency will be awarded, all other bids shall be rejected and no further bids will be sought by the lead agency on behalf of the registered members who have submitted estimates.

(b) The master contract shall state that the bid prices may be extended to registered members who have not submitted estimates prior to the advertisement for bids with the written approval of the lead agency and the contractor.

(c) A statement as to whether or not insurance certificates and/or performance bonds are necessary.

#### **5:34-7.11 Cooperative pricing system financial and contractual details**

(a) The lead agency shall certify the funds available for its own needs.

(b) The master contract executed shall provide for the following:

1. The quantities ordered for the lead agency's own needs; and
2. The estimated aggregate quantities to be ordered by the registered members who submitted estimates, subject to the specifications and prices set forth in the master contract.

(c) The lead agency shall supply the registered members of the cooperative pricing system who have submitted estimates, the name of the successful bidder, prices awarded and the contract identification number. A registered member may request a copy of the specifications. Each registered member who submitted estimates may then order directly from the vendor. If the cost of the order is under the bid threshold, and if the contracting agent is authorized to do so, then the contracting agent may issue a purchase order, pursuant to N.J.S.A. 40A:11-3a or 18A:18A-3a, as appropriate. If the cost of the order exceeds the bid threshold, then the contract must be awarded by resolution of the governing body in accordance with N.J.S.A. 40A:11-4a or 18A:18A-4a, as appropriate. The system identifier shall be affixed to each purchase order or contract and shown on all forms pertaining thereto.

(d) Registered members who submit estimates shall not issue orders and contractors shall not make deliveries, that deviate from the specifications or price as set forth in the master contract.

#### **5:34-7.12 Cooperative pricing system use of pre-existing contracts**

(a) A registered member of a cooperative pricing system which has not submitted estimates to the lead agency before the advertisement for bids may participate in the resulting contract for that particular item only with the prior written approval of the lead agency and the contractor.

(b) A contracting unit which is not a registered member of a cooperative pricing system at the time of the awarding of a contract may participate in the contract once it has

become a registered member of the system and has received the written approval of the lead agency and the contractor.

(c) This section shall not apply to joint purchasing systems.

#### **5:34-7.13 Regional cooperative pricing system**

(a) Two or more registered cooperative pricing systems may join together for the provision and performance of goods and services, including the purchasing of energy. The registered membership of each individual cooperative pricing system shall be deemed to be a member of the regional cooperative pricing system upon submission to the Director a list of the membership of each system comprising the regional cooperative pricing system.

(b) Registration of a regional cooperative pricing system shall be pursuant to the requirements set forth in N.J.A.C. 5:34-7.5.

(c) When a municipality which has aggregated its residents or business customers for gas supply service or electric generation service becomes a member of a regional cooperative pricing system for the purpose of purchasing energy, it shall simultaneously notify the lead agency of the cooperative pricing system of which it is a member and the lead agency of the regional cooperative pricing system of the participation of its residential or business customers and their respective energy supply demands.

#### **5:34-7.14 Joint purchasing systems financial and contractual details, exclusive of boards of education**

(a) The financial and contractual details set forth in this section shall apply only to contracting units subject to the requirements of the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.). Boards of education shall be subject to the financial and contractual details set forth in the Public School Contracts Law (N.J.S.A. 18A:18A-1.1 et seq.) and the administrative requirements contained in N.J.A.C. 6:20.

(b) In the case of a joint purchasing system, the lead agency shall comply with the certification of funds requirement of N.J.A.C. 5:30-5 with respect to the full amount of the contract and Division of Local Government Services' requirements for Encumbrance Accounting Systems.

(c) The funds of the lead agency applicable to its own share of the contract to be awarded shall be charged to regular appropriations in its budget.

(d) Prior to handling the funds of the other registered members, the lead agency shall request approval of the Director for a Dedication by Rider pursuant to N.J.S.A. 40A:4-39, entitled "Receipts from Other Agencies participating in the (Name of System) joint purchasing system, System Identifier \_\_\_\_\_." In order to meet the statutory requirement that expenditures under a Rider may be made only in accordance with the availability of funds, the following steps shall be taken:

1. Prior to the award of contract, the chief financial officer of each registered member (other than the lead agency) shall issue a certificate of available funds, in accordance with N.J.A.C. 5:30-5.
2. The contracting agent of each registered member, with authorization by resolution of the governing body if over the statutory bid limit, shall issue a purchase order to the lead agency together with a copy of its certification of available funds.
3. The lead agency shall, in accordance with N.J.A.C. 5:30-5, issue its own certificate, covering the full amount of the proposed contract including both its own share and those of the registered members. The certificate shall be conditional with respect to the amounts due from the registered members so that the certificate shall read in part as in the following example:
 

\$5,000 From (Lead Agency) appropriation number 207, Road Department, Other Expenses.

\$2,000 Due from (Name of registered member) pursuant to its purchase order number 70243 and Certification of Available Funds dated \_\_\_\_\_, (Lead Agency) Dedication by Rider Account Number 7.

\$1,000 Due from (Name of registered member) per its purchase order Number A- 402 and Certification of Available Funds dated \_\_\_\_\_, (Lead Agency) Dedication by Rider Account Number 7.

\$8,000 Total Certified.
4. The lead agency shall then award the total contract to the successful bidder.
5. The lead agency shall not advance funds of its own to cover the purchase on behalf of the registered members but shall make payments only upon receipt of the funds. Payments to the lead agency shall be made promptly in accordance with an agreed-upon schedule, which may include making payment to the lead agency in advance of receipt of goods. The voucher providing for the advance payment shall indicate:
 

"Transfer of funds to (name of lead agency) as cash advance to enable it to purchase the following on behalf of (name of registered member) as Lead Agency in (name of joint purchasing system), System Identifier \_\_\_\_\_."

"(Then list what is to be purchased.)"
6. Funds received by the lead agency as advances from registered members shall be:
  - i. Placed in a separate bank account established within the Rider and held in trust for the purpose of permitting the lead agency to serve as contracting agent for the awarding of joint purchasing contracts;
  - ii. Used only for the payment of actual bills to the contractors pursuant to the overall joint purchasing agreement; and

- iii. Returned immediately to the registered member upon any determination that the full amount is not needed for payments as initially expected.

#### **5:34-7.15 Commodity resale system registration**

- (a) A contracting unit which purchases gasoline, diesel fuel or snow removal chemicals, public works materials and supplies, including road and roadway construction materials or any other such materials as may be approved by the Director directly from a vendor for its own consumption, may resell a portion of that commodity to another local contracting unit.
- (b) All commodity resale systems shall be subject to an initial registration with and approval by the Director. In reviewing the application, the Director shall utilize the criteria set forth in N.J.A.C. 5:34-7.5(e).
- (c) Approval shall be for a period not to exceed five years.
- (d) The lead agency of the proposed system shall apply to the Director on behalf of the other participating unit(s).
- (e) Application shall be made on Form CP-2060.
- (f) The lead agency shall authorize the creation of the resale system by resolution.
- (g) The lead agency acting on behalf of itself and any participating contracting unit shall at the time of initial system registration or when a new member is added to the system, submit to the Director a copy of the purchase agreement or contract between the units and all confirming resolutions.
- (h) The Director shall act upon the application pursuant to N.J.A.C. 5:34- 7.10.
- (i) Any change in the status of the system, the addition or deletion of a member or commodity, shall be submitted by the lead agency to the Director on Form CP-2060.
- (j) The Director shall be notified in writing by the lead agency within 10 days of any change in the status of the commodity resale system.

#### **5:34-7.16 Commodity resale system renewal**

- (a) Documents requesting the renewal of the registration of a commodity resale system shall be submitted to the Director for review and approval 45 days prior to the date set by the Director for the expiration of the system's registration.
- (b) The lead agency shall apply to the Director for renewal of the Commodity Resale System for a period not to exceed five years.
- (c) The renewal package shall include the following:
  - 1. Form CP-2060;
  - 2. The lead agency resolution reauthorizing the system; and
  - 3. A list of the current membership of the system.

(d) The time for the review-approval period shall commence upon the determination by the Director that the application for system renewal is complete.

(e) The lead agency shall notify the Director in writing of a decision not to renew the system's registration.

#### **5:34-7.17 Accounting requirements for commodity resale systems**

(a) The accounting requirements set forth in this section shall apply only to contracting units subject to the requirements of the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.). Boards of education shall be subject to the financial and contractual details set forth in the Public School Contracts Law (N.J.S.A. 18A:18A-1.1 et seq.) and the administrative requirements contained in N.J.A.C. 6:20.

(b) Expenditure of lead agency funds applicable to its own use of the commodity shall be charged to current fund appropriations in its annual budget.

(c) The lead agency shall request approval of the Director for a Dedication by Rider pursuant to N.J.S.A. 40A:4-39, entitled "Receipts from Other Agencies participating in the (Name of System) Commodity Resale System, System Identifier." In order to meet the statutory requirement that expenditures under a Rider may be made only in accordance with the availability of funds, the following steps shall be taken:

1. The authorized contracting agent of each registered member shall issue a purchase order to the lead agency, together with a copy of its certification of available funds, and resolution of the governing body if projected expenditures exceed the statutory bid threshold;
2. The lead agency, at agreed upon intervals, shall submit to the participating members of the system an invoice for the amount of the commodity consumed. Payments to the lead agency shall be made by appropriation in the annual budget; and
3. Funds received by the lead agency from registered members shall be:
  - i. Placed in a bank account established by Rider and held in trust; and
  - ii. Used only for the payment or purchase of the resale commodity consumed.

#### **5:34-7.18 Energy aggregation**

(a) A municipality may provide energy supply to residents and businesses situated within its territorial boundaries.

(b) A county government may enter into a contract for a government energy aggregation program only if one or more constituent municipalities in the county adopt an ordinance authorizing the county to enter into such a contract.

(c) A county government energy aggregation program shall only be conducted for residential and business customers located within the constituent municipalities that have approved participation in the county's government aggregation program.

(d) Only counties and municipalities acting pursuant to the conditions set forth in this chapter may aggregate residential and business customers for gas supply or for electric generation services.

(e) A cooperative pricing system undertaking energy aggregation in which the lead agency is not a county or municipality and the membership includes a mix of local contracting units including municipalities and counties, shall not include municipalities and counties who seek to provide energy to residents and businesses.

#### **5:34-7.19 Cooperative purchasing of energy**

(a) Two or more contracting units may join together to form a cooperative pricing system for the sole specific purpose of purchasing energy, or an existing registered cooperative purchasing system may add energy as a commodity to be purchased, pursuant to the Electric Discount and Energy Competition Act (P.L. 1999, c.23) and the Interim Government Energy Aggregation Program Standards promulgated by the Board of Public Utilities.

(b) The purchase of energy shall be subject to the terms and conditions of the bid specifications and a master contract. The specifications shall be drafted pursuant to Section 4.1a and 4.1b, Bidding Specifications of the Interim Government Energy Aggregation Program Standards promulgated by the Board of Public Utilities.

(c) Take and pay contracts for the purchase of energy where the government aggregator commits to pay for a certain amount of energy, whether or not the energy is actually received or used by the government aggregator or participants in a cooperative pricing system are specifically prohibited.

#### **5:34-7.20 Binding estimate option**

Notwithstanding any of the restrictions or conditions set forth in this chapter, the lead agency of a cooperative purchasing system shall determine prior to the solicitation of bids whether the estimates submitted by a duly registered member of the system shall be considered firm and binding or a member may withdraw its estimate even after a supplier has been selected. The mechanism for determining systemwide consensus shall be the responsibility of the lead agency.

#### **5:34-7.21 County cooperative contract purchasing system creation**

(a) Only a county may establish a county cooperative contract purchasing system. The county, at its discretion and with the approval of the vendor, may permit contracting units located within the county's geographic boundaries to procure the provision and performance of goods and services for their own needs, subject to the specifications, terms and conditions set forth in the contract awarded by the county.

(b) A county shall authorize the establishment of a county cooperative contract purchasing system by resolution.

### **5:34-7.22 County cooperative contract purchasing system registration**

- (a) A county cooperative contract purchasing system shall be subject to registration with and approval by the Director.
- (b) Application for registration shall be made on CCCP-1917.
- (c) The Director shall act upon the application within the time provided for review pursuant to N.J.A.C. 5:34-7.28.
- (d) In reviewing the application, the Director shall utilize the following criteria, as established by N.J.S.A. 40A:11-11(5):
  - 1. Provision for maintaining adequate records and orderly procedures to facilitate audit and efficient administration;
  - 2. Adequacy of public disclosure of such actions taken by the lead agency;
  - 3. Adequacy of procedures to facilitate compliance with all provisions of the Local Public Contracts Law and corresponding rules; and
  - 4. Clarity of provision to assure that the responsibilities of the respective parties are understood.
- (e) Approval shall be for a period not to exceed five years, and shall be limited to the terms and scope of services presented for approval. Any subsequent changes shall be submitted to the Director on Form CCCP-1917 for county cooperative contract purchasing system.
- (f) A county shall notify the Director in writing of a decision to terminate the registration of the system.

### **5:34-7.23 County cooperative contract purchasing system identifier**

- (a) The Director shall assign a system identifier to each county cooperative contract purchasing system at the time of its approval.
- (b) The identifier shall be included on all contracts, purchase orders, bidding documents, vouchers and records relating to the operations of the county cooperative contract purchasing system.
- (c) The identifier shall be provided to each local contracting unit purchasing under the terms and conditions of a contract awarded by the county as a county cooperative contract purchasing system. The participating contracting units shall include the system identifier on all contracts, purchase orders, documents, vouchers and records relating to the purchases made through a county cooperative contract purchasing system.

### **5:34-7.24 County cooperative contract purchasing system administrative responsibilities**

- (a) Upon approval of a county cooperative contract purchasing system registration and annually thereafter either on the anniversary of the registration of the system or in

January of each succeeding year, the lead agency shall publish in its official newspaper a notice similar in content to the following:

Notice of County Cooperative Contract Purchasing System

The County of (name of county) acts as lead agency in a county cooperative contract purchasing system. Under this system, the County solicits competitive bids for certain items to be purchased. Local contracting units within the county may purchase under the terms and conditions of selected contracts awarded by the County without the necessity of securing formal bids. This is a county cooperative contract purchasing system as defined and regulated by N.J.A.C. 5:34-7. Interested citizens or vendors may obtain information regarding the manner of operation of this system by contacting (name, address and phone number of system contact). The System Name Is \_\_\_\_\_. The System Identifier is: \_\_\_\_\_. The Systems' establishment was approved by the Director of the Division of Local Government Services and has an expiration date of (expiration date).

(b) The county shall make the contract number available to any contracting unit within the county which seeks to purchase under the terms of a contract awarded by the county.

(c) A county managing a county cooperative contract purchasing system shall include in the specifications the county's own requirements, stated in definite quantities. The county shall identify the contracting units which may purchase under the terms of the contract if awarded.

**5:34-7.25 County cooperative contract purchasing system county requirement for bids**

(a) Each request for bids to be included in the county cooperative contract purchasing system by the county shall contain the following:

1. Language requiring uniform bid price(s) for both the county and registered members. A provision with respect to the registered members shall be included substantially as follows:

**ACCOMMODATION OF LOCAL CONTRACTING UNITS WITHIN THE COUNTY OF (Name of County)**

[ ] Check here if willing to provide the goods and services herein bid upon to local governmental contracting units located within the County of (insert name of county) (System Name and Identifier) without substitution or deviation from specifications, size features, quality, price or availability as herein set forth. It is understood that orders will be placed directly by the contracting units, subject to the overall terms of the contract to be awarded by the County of (name of the



county), and that no additional service or delivery charges will be allowed except as permitted by these specifications.

[ ] Check here if not willing to extend prices to contracting units located in the County of (name of county) affect consideration of this bid with respect to the needs of (name of the lead agency).

2. A statement as to the procedure to be followed in the event that the lowest responsible bidder declines to extend prices to the registered members. The contract for the stated needs of the county will be awarded to the lowest responsible bidder, and specifically not made available to contracting units within the county.

#### **5:34-7.26 County cooperative contract purchasing system renewal**

- (a) Documents requesting the renewal of the registration of a county cooperative contract purchasing system shall be submitted to the Director for review and approval prior to the date set by the Director for the expiration of the system's registration.
- (b) The county shall authorize the renewal of the system by resolution.
- (c) The county shall apply to the Director for system renewal for a period not to exceed five years.
- (d) The renewal application package shall at a minimum include the following:
  1. Form CCCP-1917; and
  2. County resolution reauthorizing the system.
- (e) The 10-day period for the review and approval of the renewal of a county cooperative contract purchasing system registration shall commence only upon the determination by the Director that the application renewal is complete.
- (f) The county shall notify the Director in writing of a decision not to renew the system's registration.

#### **5:34-7.27 Member reports**

At the discretion of the lead agency for a cooperative purchasing system, county cooperative contract purchasing system and any energy cooperative pricing system, participants shall file such reports, forms or documents designated by the lead agency, setting forth the use and expenditures related to contracts executed by the participants of the cooperative purchasing system. Such reports may be used to track and evaluate the utilization of the contracts executed by the lead agency on behalf of the participants.

#### **5:34-7.28 Time for review-all systems**

- (a) The Director shall approve or reject all applications within 45 days.

(b) The 45 day review period shall commence only upon the determination by the Director that the application is complete.

(c) Failure of the Director to act upon an application within 45 days shall constitute a default approval of the application for a period of five years or in the case of new membership, until the date previously approved by the Director for the termination of system registration pursuant to N.J.A.C. 5:34-7.5(f).

#### **5:34-7.29 The State of New Jersey's cooperative purchasing program**

(a) The system identifier of 1 NJCP shall represent the State of New Jersey Cooperative Purchasing Program administered by the Division of Purchase and Property within the Department of the Treasury. This identifier shall be used by all contracting units purchasing under the Division of Purchase and Property's Cooperative Purchasing Program.

(b) Participation in the State Cooperative Purchasing (Pricing) Program does not require a formal agreement with the Division of Purchase and Property, nor is approval of the Director required.

(c) Contracts awarded under a State Cooperative Purchasing contract that are in excess of the contracting units bid threshold shall be made by resolution of the governing body. A resolution of the governing body shall not be required for State Cooperative Purchasing contracts for textbooks or other educational material that were previously approved by a board of education as part of the board's adopted curriculum policies.

(d) The terms and conditions of the contracts awarded by the State Division of Purchase and Property shall be binding upon the contracting unit and the vendor. When using a State contract, contracting units are not entitled to any bonding or indemnification protection that is provided to the State unless specifically extended to the contracting unit by the vendor. A vendor is not required to extend such protections, but may do so upon agreement with the contracting unit.

(e) A correctly prepared and properly executed purchase order by a contracting unit shall serve as a contract between the contracting unit and a contractor awarded a contract pursuant to N.J.S.A. 40A:11-12 or 18A:18A-10. In addition to the system identifier, each purchase order shall include the State contract number on which the purchase is based.

#### **5:34-7.30 Application of N.J.S.A. 40A:11-5(4) or 18A:18A-5e: purchases at 10 percent less than State contract price**

(a) In applying the provisions of N.J.S.A. 40A:11-5(4) or 18A:18A-5e, the purpose of purchasing identical materials, supplies or equipment, in the same quantities, under a State contract without public bidding, the following conditions shall apply. For the purpose of this section, the term contract item shall mean the item being purchased that is the identical material, supply or equipment.

1. Quotations for the contract item shall not be received from any vendor to whom the State contract has been awarded and where such vendor has agreed

to extend the contract pricing for the item to local contracting units pursuant to N.J.S.A. 52:25-16.1.

2. When a State contract includes different prices based on the quantity or volume purchased, the contracting unit shall be based on quotations for identical quantity or volume levels.
3. Terms and conditions of the State contract, as found in the Notice of Award related to length of contract, warranty, delivery and spotting terms, supply, costs, payment terms, installation and other related items (except bonding and indemnification provisions) are met by the vendor providing the quotation.
4. If the specification for a contract item in a Notice of Award includes a specific manufacturer's brand and model number, quotations shall be based on the same manufacturer's brand and model number.
5. If the specification for a contract item in a Notice of Award for the contract item is based on a performance specification, the contracting agent may receive quotations reflecting different manufacturer's brand and models, and when making the contract award, the contracting agent shall certify in writing that the item being purchased is identical to or exceeds the specification of the contract item.
6. Only those options or alternatives that are provided for in a Notice of Award may be purchased by a contracting unit. The addition of non-included options or alternates as a part of a contract award under this section is prohibited.

#### **5:34-7.31 Authority of Director**

- (a) The Director shall take whatever additional action deemed advisable to assure the orderly conduct of cooperative purchasing systems in accordance with sound financial administration in accordance with statutory responsibilities.
- (b) The Director shall prepare such guidelines as determined necessary to assist contracting units in the creation and administration of cooperative purchasing systems.

#### **5:34-7.32 Enforcement**

- (a) All cooperative purchasing systems shall comply with the provisions of these rules at all times. The lead agency of any cooperative purchasing system deemed by the Director to be in noncompliance shall be notified by certified mail. The lead agency shall explain in writing within 10 working days the steps being taken to correct the noncompliance. Failure of the lead agency to respond within the time provided shall result in the notification to the lead agency by the Director by certified mail to appear before the Director, or his or her designee. Notice shall be given at least 10 working days prior to the date of appearance and shall detail the nature of the alleged noncompliance. Failure to appear may result in the suspension or termination of the registration of the system.

- (b) No later than five days after an appearance required herein, the Director shall issue a written determination on the issue of regulatory compliance. A copy of the determination shall be forwarded by certified mail to the lead agency.
- (c) A determination of noncompliance shall result in the immediate commencement of a 15 day grace period. During this time, the lead agency shall rectify all items of noncompliance, to the satisfaction of the Director.
- (d) Failure of the lead agency to undertake such action as required by the Director to resolve the issue of noncompliance may result in the suspension or termination of the registration of the system.

## **SUBCHAPTER 8. CONTRACTS SUBJECT TO PUBLIC BIDDING**

### **5:34-8.1 Multi-year contracts**

- (a) All multi-year contracts, including all multi-year leases and multi-year leases with option to purchase which are authorized under N.J.S.A. 40A:11- 15(7), 40A:11-15(15) or 18A:18A-42(f), and other multi-year contracts subject to N.J.S.A. 40A:11-15 and 18A:18A-42 for the procurement of goods or services shall be subject to competitive bidding if the cumulative amount to be expended during the duration of the multi-year lease or contract exceeds the threshold for competitive bidding for the contracting unit.
- (b) Pursuant to the provisions of N.J.S.A. 40A:11-15 or 18A:18A-42, a contract award that was based upon receipt of quotations shall not be extended if the total value of the contract exceeds the bid threshold, which includes the original award plus any extension.

### **5:34-8.2 Determinations of aggregation**

- (a) This section shall affect determinations of aggregation for purposes of whether a contract is subject to public bidding as set forth in N.J.S.A. 40A:11-3, 40A:11-4 and 40A:11-7, and as set forth in N.J.S.A. 18A:18A- 3, 18A:18A-4, and 18A:18A-8, and is adopted pursuant to N.J.S.A. 40A:11-7.1 and 18A:18A-8.1. The provisions of this section shall not apply to those goods or services where the work is single in character and for those goods or services that are necessary for the completion of such a contract.
- (b) To determine if goods or services that are expected to be used will reach the bid threshold during the contract year, the contracting agent or purchasing agent, as defined at N.J.A.C. 5:34-1.2, shall use professional judgment based on prior experience of the contracting unit, estimates and plans for the upcoming contract year based on information such as the contracting unit's budget and purchasing history, and the amount purchased in the previous contract year. When calculating the amount purchased in the previous contract year, the calculation shall be based on the period of 12 consecutive months following the award of a contract.

(c) To determine if goods or services that are expected to be used during a contract year should be combined with other similar goods or services in a single bid, the contracting agent or purchasing agent shall use the following methods or techniques as may be appropriate:

1. The contracting agent or purchasing agent shall request the various organizational components of the contracting unit to estimate and provide the contracting agent or purchasing agent with their needs.
2. Based upon appropriate study and evaluation of the competitive marketplace, the contracting agent or purchasing agent shall determine the range of goods and services that are best suited for aggregation to maximize potential cost savings and to maximize vendor participation. This can be accomplished by:
  - i. Determining whether there are vendors capable of submitting bids on a range of goods or services that are sufficiently similar; or
  - ii. Determining that commercial business practices related to the provision or performance of the goods or services will result in a price advantage to the contracting unit if the goods or services were made part of a separate contract.
3. In considering if a particular good or service is subject to public bidding, the amount of money spent with a given vendor shall not in itself be a determining factor of reaching the threshold.
4. In determining if various expenditures are part of the same work or are similar goods or services, the emphasis shall be placed on the purpose of the goods and services rather than from whom they are purchased.
5. Where portions of any goods or services can be purchased through provision of law that do not require the contracting unit to publicly bid, such as a State, county, or cooperative purchasing contract, any remaining portions may be counted as separate from the portion that is not required to be bid. Such purchases may be considered as a separate aggregation calculation for the purpose of reaching the bid threshold.

### **5:34-8.3 When determinations of aggregation are found to be incorrect**

(a) In each instance of (a)1 and 2 below, the amount required to be procured, is hereinafter defined to be the "remaining amount." This section shall affect determinations of aggregation pursuant to N.J.S.A. 40A:11-3, 40A:11-4 and 40A:11-7, and as set forth in N.J.S.A. 18A:18A-3, 18A:18A-4, and 18A:18A-8, and is adopted pursuant to N.J.S.A. 40A:11-7.1 and 18A:18A- 8.1 when:

1. Initial estimates of goods or services needed during the contract year are incorrectly anticipated to be less than the bid threshold; or
2. Initial estimates of goods or services needed during the contract year that had been exempt from public bidding are later found to be incorrect.

- (b) When either of the conditions in (a)1 or 2 above exist, the provisions of this section shall apply.
- (c) If the remaining amount exceeds the bid threshold, public bidding for the remaining amount should take place as soon as practicable after the purchasing agent or contracting agent becomes aware of the change in needs. (See chapter Appendix.)
- (d) Subject to the provisions of (d)1 and 2 below, the contracting agent or purchasing agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount. If the remaining amount is between 15 percent and 100 percent of the contracting unit's bid threshold, then:
1. The governing body may designate in advance an elected official to determine whether public bidding or the solicitation of quotations would be most advantageous in these circumstances; or
  2. If the governing body fails to designate an elected official, it retains the responsibility to make the determination by resolution. (See chapter Appendix.)
- (e) If the remaining amount to be procured by the contracting unit is less than 15 percent of its bid threshold, the contracting agent or purchasing agent may solicit quotations for the remaining amount.
- (f) In seeking the governing body's or its designee's authorization to solicit quotations under (d) and (e) above, the contracting agent or purchasing agent shall:
1. Certify to the governing body or its designee, as appropriate, the need for additional goods and services;
  2. Provide a description of how similar goods or services have been procured during the contract year to date;
  3. Obtain a resolution from the governing body or written approval from its designee, as appropriate, approving the purchase; and
  4. Provide a report of all procurements made under this section to the full governing body.
- (g) No additional goods or services shall be procured through the solicitation of quotations under (d) above until the resolution or written approval approving the purchase has been passed by the governing body or in the case of a designated elected official, other required form of written approval has been obtained. (See chapter Appendix.)
- (h) If the actual need for goods or services that are publicly bid are found during the course of the contract to be greater than the amount bid, the change order procedures set forth in N.J.A.C. 5:30-11 or 6A:23-7.1 shall be used, as appropriate.
- (i) Contracts issued pursuant to this section shall include a reference to the subsection under which the purchase is authorized.

#### **5:34-8.4 Intentional miscalculations to avoid public bidding**

Under no circumstance shall a contracting unit avoid bidding by knowingly miscalculating estimates, taking advantage of differences between contract year and fiscal year, or using another mechanism or artifice intended to intentionally avoid public bidding.

### **SUBCHAPTER 9. SPECIAL CIRCUMSTANCES**

#### **5:34-9.1 Purchase of proprietary goods or services**

(a) In determining whether a good or service meets the definition of "proprietary" set forth in N.J.S.A. 40A:11-2(39) or 18A:18A-2cc, the terms used in the definition of "proprietary" shall be defined as follows:

1. "Specialized nature" means that the purpose to which the goods or services will be used has such unique characteristics that only the goods or services of a single vendor are capable of meeting the contracting unit's needs. The following shall be considered as non-limiting examples of goods or services that may, under appropriate conditions, meet the test of being of a specialized nature:
  - i. The use of a good or service other than the proprietary one will undermine the functionality or operational performance of existing facilities; or
  - ii. The good or service is patented and the patented feature is essential for operational performance.
2. "Necessary for the conduct of its affairs" means that the public need for the proprietary designation is of such a compelling nature that the value to the public that is gained by the proprietary designation overshadows the public benefit of permitting "brand name or equivalent" and the benefits of such competition. The following shall be considered as non-limiting examples of goods or services that may, under appropriate conditions, meet the test of being necessary for the conduct of its affairs:
  - i. The contracting unit has a substantial investment in facilities, training, replacement parts, or complimentary items that warrants reliance on a specific manufacturer or vendor to maintain the value of the investment.
  - ii. Unique circumstances as to a facility or environment preclude the use of other goods or services.

(b) Prior to advertising for the receipt of bids that includes proprietary goods or services, the contracting agent or purchasing agent shall certify in writing to the chief executive officer of the contracting unit an explanation of why the goods or services are

of a specialized nature and necessary for the conduct of the affairs of the local contracting unit. The description shall not consist of rewriting or paraphrasing the statute or regulations but shall be specific to the circumstances. Such certification shall be included as part of the bid documents.

(c) The resolution of the governing body required by N.J.S.A. 40A:11-13(d) or 18A:18A-15d shall include a description of why the goods or services are specialized in nature and necessary for the conduct of the affairs of the contracting unit. The description shall not consist of rewriting or paraphrasing the statute or regulations but shall be specific to the circumstances.

(d) When taken in context of computer systems or dedicated software, the use of the proprietary designation shall be interpreted to allow for competition within the purposes for which the software is to be used. The competitive contracting process at N.J.S.A. 40A:11-4.1 et seq. and 18A:18A-4.1 et seq. is intended to allow for competition where there may be a limited number of vendors selling certain types of application software, that is, financial, human resources, web site hosting, computerized telephone systems, geographic information, police records, or computerized dispatch systems. The competitive contracting process is not intended for those circumstances that involve networking or telecommunications switching services.

#### **5:34-9.2 Use of "brand name or equivalent" pursuant to N.J.S.A. 40A:11-13 and 18A:18A-15**

(a) To encourage free, open, and competitive bidding, prior to referencing a "brand name or equivalent" in a bid specification pursuant to N.J.S.A. 40A:11-13 or 18A:18A-15, a contracting agent or purchasing agent shall first consider using a specification based on any of the following:

1. A standard issued by a national or international testing or standards setting organization, including, but not limited to, the American Society for Testing and Materials (ASTM), National Institute of Standards and Technology (NIST), Internet Engineering Task Force (IETF), International Standards Organization (ISO), IEEE Industry Standards and Technology Organization (IEEE-ISTO), any entity accredited to set standards by the American National Standards Institute (ANSI);
2. A generic specification available through a commercial or non-commercial service such as MasterSpec® or similar service; or
3. Specialized programs such as a listing in the Building Products Pre Approval Program maintained by the National Institute of Building Sciences.

(b) A contracting agent or purchasing agent shall not use a "brand name or equivalent" unless they have knowledge that at least one equal exists. If there are no equals or if the nature of the brand name good or service effectively restricts bidders to that single good or service, the contracting agent or purchasing agent must consider the matter subject to the provisions of proprietary goods or services at N.J.A.C. 5:34-9.1.



(c) When a specification uses "brand name or equivalent," the listed brand name shall serve as a reference or point of comparison for the functional or operational characteristic desired for the good or service being requested. Where a bidder submits an equivalent, it shall be the responsibility of the bidder to document the equivalence claim. Failure to submit such documentation shall be grounds for rejection of the claim of equivalence.

(d) Under no circumstance shall specifications require any form of "pre- approval" or "pre-qualification" of an equivalent product before the submission of bids.

### **5:34-9.3 Cancellation or postponement of receipt of bids or proposals**

(a) Publicly announced receipt of bids or competitive contracting proposals shall be considered cancelled when the contracting unit must amend or modify the bid specifications and cannot meet the requirements of N.J.S.A. 40A:11- 23 and 18A:18A-21. The following procedures shall be used in the event a contracting unit cancels the receipt of publicly advertised bids or competitive contracting proposals:

1. All vendors who have either submitted bids or proposals, or received specifications or request for proposals, shall be notified by telephone, fax, or e-mail that the receipt thereof has been cancelled, the reason therefore, and notification regarding the return of the unopened bids pursuant to this section.
2. The contracting unit shall allow vendors to retrieve bids or proposals that had been:
  - i. Submitted at or before the time of cancellation;
  - ii. Previously sent but had not arrived by the time of cancellation; or
  - iii. For those not picked up by a vendor within 10 business days of being notified of their availability, the contracting unit shall return them, unopened, by certified mail or other delivery service that provides a delivery receipt.
3. On the day and time originally scheduled for receipt of bids or proposals, a notice shall be posted at the place where bids were to have been received, stating that the receipt of bids or proposals has been cancelled. No bids or proposals are to be received at this time.
4. All advertisements for the receipt of rescheduled bids or proposals must adhere to the requirements of N.J.S.A. 40A:11-23 or 18A:18A-21, as appropriate to the contracting unit for the statutory number of days between notice and when new bids or proposals can be received.

(b) Publicly announced receipt of bids or competitive contracting proposals shall be considered postponed when an unforeseen circumstance occurs that would affect or prohibit the opening of bids or proposals. The opening of the bids or proposals must occur within five days, excluding Saturdays, Sundays, and holidays, of the original date of the receipt of bids or proposals. The following procedures shall be used in the event a contracting unit must postpone the receipt of publicly advertised bids or competitive contracting proposals:

1. As soon as practicable, all vendors who have either submitted bids or proposals, or received specifications or request for proposals, shall be notified by telephone, fax, or e-mail that the receipt thereof has been postponed and the reason therefore.
2. If possible, on the day and time originally scheduled for receipt of bids or proposals, a notice shall be posted at the place where bids were to have been received, stating that the receipt of bids or proposals has been postponed.
3. In the event of a postponement, no bids or proposals shall be opened.

#### **5:34-9.4 Concessions**

(a) The Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., and the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq., define the term "concession" as the granting of a license or right to act for or on behalf of the contracting unit, or to provide a service requiring the approval or endorsement of the contracting unit, and which may or may not involve a payment or exchange, or provision of services by or to the contracting unit. In the case of the Public School Contracts Law, vending machines are specifically excluded from the definition. Further, a concession is only subject to this section if it is awarded to or supports a for-profit organization or purpose.

(b) Concessions are specifically deemed to include, but are not limited to, the following:

1. The right to publish a map, newsletter, directory, or calendar containing the meeting schedules and other information about contracting unit services or activities where the contractor sells advertising as full or partial payment for providing the service;
2. Installation of "welcome to (name of entity)" signs on public property where a local organization pays a fee to the sign manufacturer, who may or may not make a payment to the contracting unit, and includes the name of the local organization on the sign;
3. Use of public space or facilities (such as scoreboards, bus shelter or facility advertising) for advertising in exchange for fees or services, or discounts on services;
4. Installation of vending machines in public facilities (except for vending machines in schools);
5. The donation, sale, installation, or maintenance of equipment or facilities for use of the contracting unit;
6. The choice of a local or long distance telephone service for pay phones on public property;
7. Copying machines in a government or library facility made available for public use;
8. The right to sell goods or services on public property; or

9. Other services, rights or use as may meet the definition of concession.

(c) A concession shall not be deemed to include contributions of goods, services, or financial support for the sponsorship of the celebration of public events where the contributions offset in full or in part the cost of the specific event. For the purpose of providing examples, such public events include, but are not limited to, seasonal recreation programs, concert series, holiday celebrations, and tourism related programs. In addition, vending machines in public facilities that are considered as protected speech under the United States Constitution, such as newspapers, or facilities used for collection of material being sent through a pickup and delivery service are not deemed to be a concession.

(d) Prior to commencing procurement of any concession, the governing body of the contracting unit shall:

1. Obtain from legal counsel an opinion of the legality of procuring the concession; and
2. Pass a resolution authorizing the procurement of a concession. The resolution shall include:
  - i. A description of the public need to award a concession;
  - ii. The concession to be awarded;
  - iii. The considerations, including the benefits and any risks the governing body took into account in reaching the decision to award a concession;
  - iv. An estimate of the total value of the concession;
  - v. If any, an estimate of any revenue or services to be received by the contracting unit;
  - vi. The basis of award of the concession is based upon the most advantageous price and other factors or the lowest responsible bidder;
  - vii. An estimate of any costs to be incurred by the contracting unit as part of the concession;
  - viii. Any services, facilities, or endorsement to be provided by the contracting unit; and
  - ix. The method to be used to procure the concession pursuant to (g) below.

(e) The original legal opinion and resolution required in (d) above shall suffice for purposes of the subsequent procurement of a particular concession where the entire procurement process had been previously completed.

(f) The total estimated value of the concession shall be considered as the aggregate value in determining the procurement method that will be used. The concession shall be awarded in accordance with the relevant procedure for the method used to procure the concession. The total estimated value shall include all revenue, if any, that may be

expected to be received by the concessionaire, which shall be deemed to include the value of all payments, goods, and services received by the contracting unit. A specific exception to this subsection shall be the use of bank automated teller machines or other cash vending machines. The threshold for this service shall be based on the estimated annual value of fees charged to users of the service and the value of all payments, goods and services received by the contracting unit.

(g) Unless otherwise specifically provided for by law, concessions shall be awarded through either of the following means:

1. By informal quotations, when the total estimated value of the concession is less than the bid threshold; or
2. By receipt of public bid or competitive contracting, when the total estimated value of the concession exceeds the bid threshold or at any time at the option of the governing body.

(h) While contracting units that are boards of education are not required to use the concession process for food and drink vending machines, the use of these provisions are recommended to enhance the integrity of the procurement process. If a contracting unit that is a board of education combines food and drink vending machines with concessions in a single procurement, the procedures of this section shall apply for the entire procurement.

#### **5:34-9.5 Miscellaneous circumstances**

(a) When a single contract for the collection of solid waste includes both municipal solid waste, pursuant to N.J.S.A. 40A:11-15(3), and collection from facilities owned by a contracting unit, pursuant to N.J.S.A. 40A:11-15(38), the contract may be granted for a term of not more than five years.

(b) When contracts for goods or services are less than 15 percent of the bid threshold, the purchasing agent shall employ sound business practices in awarding the contract. For the purpose of this subsection, sound business practice means employing such judgment that the price charged to the contracting unit reflects current market conditions and the quantity and delivery needs of the contracting unit.

(c) When a notice of award for professional services, competitive contracting, and extraordinary unspecifiable services is required to be published in the official newspaper of the contracting unit, such a notice shall be published no later than 20 calendar days after the passage of the resolution awarding the contract.

(d) Pursuant to N.J.S.A. 40A:11-4b(1) and 18A:18A-4b(1) with regard to the use of mediation to reach a finding of prior negative experience, if the mediation activity included a requirement of confidentiality and if no final determination of responsibility was reached, such mediation activity shall not be considered as a cause for a finding of prior negative experience, unless stipulation was made to the contrary.

(e) In a contracting unit subject to the Public School Contracts Law, a purchasing agent may appoint a "duly authorized designee" to act on behalf of and be responsible to the purchasing agent for such actions as related to purchasing. The purchasing agent shall

recommend such designee to the Board of Education for their consideration and approval. The designee cannot act on behalf of the purchasing agent until Board approval is received. Under these circumstances, the purchasing agent shall continue to hold the authority, responsibility and accountability for the purchasing activity of the contracting unit. The use of this provision does not permit a "duly authorized designee" to exercise the authority of a qualified purchasing agent.

#### **5:34-9.6 Purchasing at 10 percent less than a State cooperative contract price**

(a) A contracting unit that procures materials, supplies or equipment for at least 10 percent less than the State cooperative contract price, pursuant to N.J.S.A. 40A:11-5(4) or 18A:18A-5(e), shall submit the following documentation to the Director within five working days of the award of any such contract:

1. A copy of the purchase order;
2. A copy of the requisition or request for purchase order (if applicable);
3. The written certification of its purchasing agent stating that the purchase price of the materials, supplies or equipment is at least 10 percent less than the State contract price;
4. Documentation verifying that the materials, supplies or equipment purchased by the contracting unit are identical to the materials, supplies or equipment on State contract;
5. A copy of each request for quotation issued by the purchasing agent;
6. Copies of each of the three quotations received by the purchasing agent, which shall include the vendor's name, address, identification of items offered, prices quoted, and the percent discount (if applicable); and
7. A copy of the adopted resolution, approving or awarding the contract for the purchase of materials, supplies or equipment, approved by two-thirds affirmative vote of the full membership of the governing body or, in the case of boards of education, a copy of the motion made approving or awarding the contract for the purchase of materials, supplies or equipment, carried and recorded in the written minutes of the meeting.

(b) All purchase orders or contract documents shall include the identifier "N.J.A.C. 5:34-9.6" and the State contract number in order to validate the legal basis under which the purchase was made, and to assist in the conduct of audits and other reviews for statutory compliance.

(c) The Division has provided an optional submission checklist in chapter Appendix B, "Purchasing At 10 Percent Less Than The State Cooperative Contract Price N.J.S.A. 40A:11-5(4) and N.J.S.A. 18A:18A-5(e)." The checklist is intended to help contracting units comply with the provisions of this section. The checklist is available in the public contracts law section of the Division's website [www.state.nj.us/dca/lgs](http://www.state.nj.us/dca/lgs).

**5:34-9.7 Use of the General Services Administration's Federal Supply Schedules**

(a) A contracting unit statutorily subject to the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., or the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq., that procures reprographic equipment or services, including digital copiers, listed in any of the Special Item Numbers of the Federal Supply Schedule 36, Part IV, or update thereto, shall, pursuant to N.J.S.A. 40A:11-12(b) or 18A:18A-10(b), submit the following documentation to the Director of the Division of Local Government Services within five working days of the award of any such contract:

1. A copy of the purchase order;
2. A copy of the requisition or request for purchase order (if applicable);
3. Documentation verifying the price and description of the reprographic equipment or services, including digital copiers, under the Federal Supply Schedules;
4. Written certification of the contracting unit's purchasing agent verifying that the price of the reprographic equipment or services, including digital copiers, is no greater than the State contract price or, in the alternative, provide the rationale justifying payment of the higher Federal Supply Schedule price;
5. A copy of the vendor's consent to the terms and conditions of the State contract governing in the event of a conflict with the vendor's Federal contract; and
6. A copy of the adopted resolution approving or awarding the contract for the purchase of materials, supplies or equipment approved by the membership of the governing body or, in the case of boards of education, copy of the motion, approving or awarding the contract for the purchase of materials, supplies or equipment made, carried and recorded in the written minutes of the meeting.

(b) All purchase orders or contract documents shall include the identifier "N.J.A.C. 5:34-9.7" and if available, the State contract number issued by the Division of Purchase and Property in order to validate the legal basis under which the purchase was made, and to assist in the conduct of audits and other reviews for statutory compliance.

(c) Contracting units statutorily authorized to contract under the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq. or the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq. and procuring goods or services listed in any Special Item Numbers of the Federal Supply Schedule 36, Part IV, or update thereto, shall comply with administrative rule promulgated by the Department of the Treasury Purchase Bureau at N.J.A.C. 17:12-1A.5, Use of Federal Supply Schedules.

(d) The Division has provided an optional submission checklist in chapter Appendix C, "Use of the General Services Administration's Federal Supply Schedules N.J.S.A. 40A:11-12b and N.J.S.A. 18A:18A-10b." The checklist is intended to help contracting units comply with the provisions of this section. The checklist is available in the public contracts law section of the Division's website [www.state.nj.us/dca/lgs](http://www.state.nj.us/dca/lgs).

## APPENDIX A

The examples that follow relate to N.J.A.C. 5:34-8.3, which identifies practices that should be used in instances where the initial estimates of goods or services needed during the current contract year were anticipated to be less than the bid threshold, or had been exempt from public bidding, but are later found to be incorrect. The rule sets forth practices to follow in determining if the remaining amount should be publicly bid, or if quotations should be solicited. The following situations repeat each rule and provide an interpretative model.

In the following situations, the remaining amount (as previously defined) means: the value of similar goods and services that are needed for the remainder of the current contract year, plus the value of similar goods and services needed in the subsequent contract year.

### SITUATION 1

**N.J.A.C. 5:34-8.3(c): If the remaining amount exceeds the bid threshold, public bidding should take place as soon as possible.**

**Example:** Assume that a contracting unit has a bid threshold of \$17,500 and is on a calendar year budget cycle. To date they have purchased \$15,000 worth of chain link fence through solicitation of quotations. In December, the Recreation Director advises the purchasing agent that one field and a parking area were excluded from the initial solicitation and that an additional \$10,000 worth of chain link fence needs to be purchased for the remainder of the year. The Recreation Director further advises that an additional \$21,000 worth of chain link fence is required for anticipated projects in the next year.

Solution: The purchasing agent or contracting agent would have to immediately initiate public bidding procedures to procure the remaining chain link fence, because the additional need this year, plus the need next year, exceeds the bid threshold.

### SITUATION 2

**N.J.A.C. 5:34-8.3(d): If the remaining amount is between 15 percent and 100 percent of the contracting unit's bid threshold, and the contracting unit has previously designated an elected official to determine whether public bidding or the solicitation of quotations is most advantageous to the contracting unit, then the purchasing agent or contracting agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount.**

**Example:** The following example relates to situations where similar goods or services will not be required in the subsequent contract year, and the contracting agent or

purchasing agent has the option to either publicly bid the remaining amount, or seek authorization from the governing body or its designee to solicit quotations.

Assume that a contracting unit has a bid threshold of \$17,500 and is on a calendar year budget cycle. To date they have purchased \$15,000 worth of chain link fence through solicitation of quotations. In December, the Recreation Director informs the purchasing agent or contracting agent that one field was excluded from the initial solicitation, resulting in an additional current year purchase of \$10,000. The Recreation Director further advises that no purchases of chain link fence are required for the subsequent year.

Solution: The purchasing agent or contracting agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount because it is between 15 percent and 100 percent of the contracting unit's bid threshold.

### SITUATION 3

**N.J.A.C. 5:34-8.3(d): If the remaining amount is between 15 percent and 100 percent of the contracting unit's bid threshold, and the contracting unit has previously designated an elected official to determine whether public bidding or the solicitation of quotations is most advantageous to the contracting unit, then the purchasing agent or contracting agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount.**

**Example:** The following example relates to situations where the remaining amount equals the value of similar goods or services to be purchased for the current contract year plus the value of similar goods or services for the subsequent contract year and is equal to between 15 percent and 100 percent of the contracting unit's bid threshold.

Assume that a contracting unit has a bid threshold of \$17,500 and is on a calendar year budget. To date, they have purchased \$15,000 worth of chain link fence through solicitation of quotations. In December, the Recreation Director informs the purchasing agent or contracting agent that one field was excluded from the initial solicitation resulting in an additional need for \$5,000 worth of chain link fence for the remainder of the current contract year. The Recreation Director advises further that \$10,000 worth of additional chain link fence needs to be purchased during the subsequent year. The additional \$15,000 of new chain link fence (\$5,000 for the remainder of the current contract year, and \$10,000 for the subsequent contract year) is less than the bid threshold of \$17,500.

Solution: Since the remaining amount is between 15 percent and 100 percent of the contracting unit's bid threshold, the purchasing agent or contracting agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount.



#### SITUATION 4

**N.J.A.C. 5:34-8.3(e): If the remaining amount is less than 15 percent of the contracting unit's bid threshold, the contracting agent or purchasing agent is authorized to solicit quotations for the purchase of the remaining amount.**

**Example:** Assume that a contracting unit has a bid threshold of \$17,500 and is on a calendar year budget cycle. To date they have purchased \$15,000 worth of chain link fence through solicitation of quotations. In December, the Recreation Director informs the purchasing agent or contracting agent that the engineer miscalculated the area, and that an additional 40 linear feet of chain link fence needs to be purchased. The cost for the additional chain link fence is \$2,600.

Solution: The purchasing agent or contracting agent would be able to solicit quotations for the remaining chain link fence, because \$2,600 (the remaining amount of goods to be purchased) is less than 15 percent of the contracting unit's bid threshold.

**Appendix B**

**N.J. DIVISION OF LOCAL GOVERNMENT SERVICES SUBMISSION CHECKLIST**

Purchase At 10 Percent Less Than The State Cooperative Contract Price (*N.J.S.A. 40A:11-5(4) and N.J.S.A. 18A:18A-5(e)*)

CONTRACTING UNIT'S NAME: \_\_\_\_\_ COUNTY: \_\_\_\_\_  
ITEM PURCHASED: \_\_\_\_\_ DATE: \_\_\_\_\_

The Local Public Contracts Law at N.J.S.A. 40A:11-5(4) and the Public School Contracts Law at N.J.S.A. 18A:18A-5(e) require information on this particular type of purchasing transaction(s) to be filed with the Director of the Division of Local Government Services. The rule, N.J.A.C. 5:34-9.6, codifies and supplements the requirements of the provisions of law. The rule requires documentation to be submitted to the Director within five (5) working days of the award of any such contract. The following documentation is submitted:

DOCUMENTATION INCLUDED WITH SUBMISSION

- 1 Copy of the purchase order with the reference N.J.A.C. 5:34-9.6 included YES ( ) NO ( )
- 2 Copy of the requisition or request for purchase order (if applicable); YES ( ) NO ( )
- 3 Written certification by the purchasing agent stating that the purchase price of the materials, supplies or equipment is at least 10 percent less than the State contract price. YES ( ) NO ( )
- 4 Documentation verifying that the materials, supplies or equipment purchased by the contracting unit are identical to the materials, supplies or equipment on State contract. YES ( ) NO ( )
- 5 Copy of each request for quotation issued by the purchasing agent; and, YES ( ) NO ( )
- 6 Copy of each of the three (3) quotations received by the purchasing agent, which shall include the vendor's name and address and identification of items offered, prices quoted, and percent discount (if applicable);and, YES ( ) NO ( )
- 7 Copy of the adopted resolution approved by two-thirds affirmative vote of the full membership of the governing body or ,in the case of boards of education, copy of the motion made, carried and recorded in the written minutes of the meeting. YES ( ) NO ( )

(Over)

OTHER COMMENTS: Please use a separate sheet of paper and attach to Checklist.

FORM SUBMITTED BY:

---

(Please Print Name)

(Title)

---

(Telephone or E-mail)

(Date)

---

Please return this form with all the required documentation to the Bureau of Local Management Services at the Division of Local Government Services, at PO Box 803, Trenton, NJ 08625-0803.

### Appendix C

#### N.J. DIVISION OF LOCAL GOVERNMENT SERVICES SUBMISSION CHECKLIST

Use Of The General Services Administration's Federal Supply Schedules  
(N.J.S.A. 40A:11-12b and N.J.S.A. 18A:18A-10b)

CONTRACTING UNIT'S NAME: \_\_\_\_\_ COUNTY: \_\_\_\_\_

ITEM PURCHASED: \_\_\_\_\_ DATE: \_\_\_\_\_

The Local Public Contracts Law at N.J.S.A. 40A:11-12b and the Public School Contracts Law at N.J.S.A. 18A:18A-10b require information on this particular type of purchasing transaction(s) to be filed with the Director of the Division of Local Government Services. The rule, N.J.A.C. 5:34-9.7, codifies and supplements the requirements of the provisions of law. The rule requires documentation to be submitted to the Director within five (5) working days of the award of any such contract for reprographic equipment or services, including digital copiers, listed in any of the Special Item Numbers of the Federal Supply Schedule 36, Part IV, or update thereto. The following documentation is submitted:

#### DOCUMENTATION INCLUDED WITH SUBMISSION

- 1 Copy of the purchase order with the reference N.J.A.C. 5:34-9.7 included; YES ( ) NO ( )
- 2 Copy of the requisition or request for purchase order (if applicable); YES ( ) NO ( )
- 3 Documentation verifying the price and description of the reprographic equipment or services, including digital copiers, under the Federal Supply Schedules; YES ( ) NO ( )
- 4 Written certification of the contracting unit's purchasing agent verifying that the price of the reprographic equipment or services, including digital copiers, is no greater than the State contract price or, in the alternative, provide the rationale justifying payment of the higher Federal Supply Schedule price; YES ( ) NO ( )
5. A copy of the vendor's consent to the terms and conditions of the State contract governing in the event of a conflict with the vendor's Federal contract; and, YES ( ) NO ( )
- 6 Copy of the adopted resolution approved by the membership of the governing body or, in the case of boards of education, copy of the motion made, carried and recorded in the written minutes of the meeting. YES ( ) NO ( )

(Over)

OTHER COMMENTS:        Please use a separate sheet of paper and attach to Checklist.

FORM SUBMITTED BY:

\_\_\_\_\_

(Please Print Name)

\_\_\_\_\_

(Title)

\_\_\_\_\_

(Telephone or E-mail)

\_\_\_\_\_

(Date)

Please return this form with all the required documentation to the Bureau of Local Management Services at the Division of Local Government Services, at PO Box 803, Trenton, NJ 08625-0803.

## **LOCAL PUBLIC CONTRACTS LAW APPLICATION OF N.J.A.C. 5:30-5.1 ET SEQ.**

### **SUBCHAPTER 5. ENCUMBRANCE ACCOUNTING AND CERTIFICATIONS OF AVAILABILITY OF FUNDS**

#### **5:30-5.1 General authority**

(a) This subchapter shall apply to all government agencies subject to the authority of the Local Finance Board pursuant to the Local Budget Law (N.J.S.A. 40A:4-1 et seq.) or the Local Authorities Fiscal Control Act (N.J.S.A. 40A:5A-1 et seq.). For the purpose of this subchapter, such government agencies shall be referred to as local units.

(b) Every governing body and chief executive officer shall take reasonable steps as necessary so that all officials and employees responsible for the administration of public contracts are aware of and are able to comply with the requirements of the law and these rules.

#### **5:30-5.2 Encumbrance systems**

(a) All local units except those subject to the Local Authorities Fiscal Control Act (N.J.S.A. 40A:5A-1 et seq.) shall maintain an encumbrance accounting system for all funds as follows:

1. The system shall be designed at a minimum to record charges to amounts appropriated for "Other Expenses" in the same or greater level of detail as "Other Expenses" are maintained in the adopted budget. This shall be done in such a way to record charges against amounts appropriated at the time the charges are authorized so that the funds allocated for such purposes are reserved and cannot be used for other charges within that line item. Examples of such authorization actions include the issuance of a purchase order or the execution of a contract.
2. If the local unit budget uses a greater detail level through the use of object accounts, transactions shall be encumbered at the object level detail.
3. Local units shall maintain internal controls that ensure that all purchases charged to "Other Expense" or other non-salary line items shall be sequentially numbered either through pre-printed multiple copy purchase orders or a computerized system that produces appropriate purchasing internal control.

(b) The Director of the Division of Local Government Services shall make available such technical documents as may be advisable to local units to provide further guidance on encumbrance systems.

(c) The provisions of this section codify and continue the provisions of Technical Accounting Directive No. 1, issued in April of 1985 and effective January 1, 1986.

### **5:30-5.3 General requirements**

- (a) The chief financial officer of a local unit, appointed pursuant to N.J.S.A. 40A:9-140.1 et seq. or N.J.S.A. 40A:9-28.1 et seq., shall be responsible for determining the availability of sufficient funds for all contracts and amendments thereto. The delegation of this duty by the chief financial officer does not relieve him or her of this responsibility.
- (b) The governing bodies of all other local units shall designate by resolution or ordinance, as appropriate, an individual to serve as the certifying finance officer. The certifying finance officer shall be responsible for determining the availability of sufficient funds for all contracts and amendments thereto. The delegation of this duty by the certifying finance officer does not relieve him or her of this responsibility.
- (c) If a purchase or the execution of a contract does not require, either by State law or any State or local regulation, specific authorization by formal action of the governing body, then the individual approving the contract or release of the purchase order shall ascertain from the chief financial officer or certifying finance officer, as appropriate, that there are available sufficient uncommitted appropriations to provide for the payment. The administrative official or employee shall be so authorized pursuant to N.J.S.A. 40A:11-3.

### **5:30-5.4 Procedure**

- (a) The following procedure shall be utilized for the certification of funds when a contract is to be awarded by the governing body of the local unit:
1. The chief financial officer or certifying finance officer, as appropriate, charged with the responsibility of maintaining the financial records of the contracting unit shall certify in writing to the governing body the availability or lack thereof of adequate funds for each contract which is pending approval by the governing body. Said certification shall designate specifically the line item appropriation(s) of the official budget to which the contract will be properly charged, ensuring that the same funds shall not be certified as available for more than one pending contract. Said officer shall be solely responsible for the accuracy of the certification.
  2. No resolution authorizing the entering into of any contract pursuant to N.J.S.A. 40A:11-1 et seq. or any other law for the expenditure of public funds to a vendor shall be enacted unless it shall recite that such a certificate showing availability of funds has been provided. The resolution shall specify the exact line item appropriation(s) or ordinance which shall be charged.
  3. The certification of availability of funds shall be attached to the original copy of the resolution or ordinance and kept in the files of the municipal clerk, clerk of the board of chosen freeholders or secretary to the governing body.
  4. Before a governing body approves a resolution or ordinance authorizing the entering into of a contract, the local unit's attorney shall be satisfied that a certificate of availability of funds has been provided.

5. A local unit's governing body shall not enter into or execute a contract unless it has been presented with a written certification from its chief financial officer or certifying finance officer, as appropriate, stating the availability of sufficient funds for the contract(s) pending approval by the governing body.
  6. When a contract is issued as a purchase order or amendment thereto, the certification of availability of funds shall be executed through the budgetary accounting encumbrance process.
- (b) When a contract is awarded and a resolution of the governing body is not required, the availability of funds shall be certified by the chief financial officer or certifying finance officer shall make an appropriate entry into the local unit's encumbrance system pursuant to N.J.A.C. 5:30-5.1 and 5.2 prior to the issuance of a contract.

**5:30-5.5 Methods of accounting for and certifying available funds for special situations**

- (a) Temporary budget: When a local unit is operating under a temporary budget, as provided for in N.J.S.A. 40A:4-19, it may enter into a contract for a period extending beyond the time period funded in the temporary budget, subject to the following:
1. The full cost of the contract for that fiscal year shall be certified against the temporary budget, which must contain sufficient appropriations therefor; or
  2. If the full cost of that year is not charged against the temporary budget, at least the prorated amount reflecting all liability to be incurred during the temporary budget period must be charged and certified, and the contract must contain a clause making its continuation past such date subject to the appropriation of sufficient funds. Immediately after the final budget adoption, a certificate of available funds shall be prepared for the remaining balance and filed with the original ordinance or resolution.
- (b) Open end contracts: When a contract provides for certain goods or services to be provided upon request, up to an established maximum, and the local unit is not obligated to order, accept or pay for said goods or services except when it orders them, then the certification of available funds shall be as follows:
1. The full maximum amount covered by the contract shall be charged against the budget at the time the contract is awarded, and the full amount shall be certified; or
  2. No amount shall be chargeable or certified until such time as goods or services are ordered or otherwise called for. Prior to incurring the liability by placing the order, the certification of available funds shall be made by the chief financial officer or certifying finance officer, as appropriate, and attached to the file copy of the purchase order or other such document. It shall be the responsibility of the official responsible for issuing the purchase order to notify and seek the certification of availability of funds from the chief financial officer or certifying finance officer, as appropriate.



(c) Contracts up to 12 months not coinciding with fiscal year: When a contract is awarded for a period of up to 12 months not coinciding with the established fiscal year of the local unit, the following methods shall be followed for purposes of accounting and providing the certification of available funds.

1. If the contract is for a professional service or is essentially a single undertaking or project with one basic work project required (such as, but not limited to, contracts for revaluation, codification, management studies and feasibility surveys), rather than being divisible into separate steps or actions which in themselves are independently acceptable as complete work products, then the full cost of the contract shall be chargeable to and certified against the budget or appropriation of the year in which the contract is awarded. This method may also, at local option, be followed for contracts described in (c)2 below.
2. If the contract is not of the character described in (c)1 above, and provides for goods or services to be provided at separate intervals over the contract period, then the amounts for which liability is to be incurred shall be charged and certified to the two respective years' appropriations at the times, as appropriate, of the contract being awarded (with respect to the amount from the first fiscal year); the adoption of the temporary budget and the adoption of the final budget (for the remainder of the contract for the second fiscal year).

(d) Multi-year contract requirements are as follows:

1. Contracts entered into pursuant to N.J.S.A. 40A:11-15 for periods in excess of 12 months shall be charged and certified as follows:
  - i. For construction and related services authorized by N.J.S.A. 40A:11-15(9), to the budget or appropriation in full at the time of contract award;
  - ii. For other contracts, to the respective budgets in accordance with the time(s) at which the respective work or services are performed or liability for payment otherwise incurred, and subject to such requirements of this section as might apply with respect to temporary budgets, open-end contracts or contracts not commencing at the beginning of the fiscal year.
2. All multi-year leases and contracts except contracts specifically exempted pursuant to N.J.S.A. 40A:11-15 shall contain a clause making them subject to the availability and appropriation annually of sufficient funds as may be required to meet the extended obligation or contain an annual cancellation clause.

(e) Advance award of contracts: No contract shall be awarded in one fiscal year if the date on which it properly takes effect falls in the next fiscal year unless the contract includes a provision making it subject to the availability and appropriation of sufficient funds in the year in which it takes effect.

(f) Payment from proceeds shall be as follows:

1. Under the circumstances when a contractual liability may be lawfully incurred and a payment may lawfully be made without an appropriation, such as for professional services for liquidation or foreclosure of tax title liens as provided by N.J.S.A. 40:50-6, the certification of available funds should recite that fact and cite the statute.
2. Contracts for services to be paid from savings generated by or from State or Federal aid funds not yet received and appropriated are not permitted unless an appropriation is made prior to the time the expenditure of funds is authorized.

### **5:30-5.6 Accounting for governmental fixed assets**

(a) All local units shall have and maintain a fixed assets accounting and reporting system that:

1. Establishes and maintains a physical inventory of fixed assets of nonexpendable, tangible property as defined and limited by the U.S. Office of Management and Budget Circular A-87, Cost Principals for State, Local and Indian Governments, incorporated herein by reference, as amended by 62FR45934 (August 29, 1997), and published at [www.whitehouse.gov/omb/circulars/a087/a087-all.html](http://www.whitehouse.gov/omb/circulars/a087/a087-all.html). A local unit may establish a capitalization level less than but not in excess of the threshold in Circular A-87, except that the useful life of such property is at least five years;
2. Places a value on all fixed assets whether constructed or acquired through purchase, grant, or gift. Fixed assets acquired after December 31, 1985 shall be valued on the basis of actual cost; prior to that time, they may be valued at cost or estimated historical cost, the basis of which shall be disclosed in the local unit's annual financial statement;
3. Has a subsidiary ledger, consisting of detailed property records for controlling additions, retirements and transfers of fixed assets. Such ledger shall be maintained and reconciled periodically and at the end of every fiscal year with the general ledger control accounts for fixed assets;
4. Provides property management standards for fixed assets that ensures that:
  - i. Property records are maintained accurately, to reflect a description and source of the property, its ownership, the acquisition cost and date, the percentage of Federal participation in the acquisition, and the location, use, and condition of the property.
  - ii. Property owned by the Federal government is marked as such.
  - iii. Periodic physical inventories are taken and reconciled with property records, with any differences being investigated to reflect the cause of difference;
  - iv. Provides a control system with adequate safeguards against loss, damage, or theft of property, and full investigation and documentation of any losses; and

v. Property is adequately maintained to keep the property in good condition; and

5. Provide a Statement of General Fixed Assets in every annual audit report.

(b) The provisions of this section codify and continue the provisions of Technical Advisory Directive No. 2, issued in April of 1985 and effective January 1, 1986, and as amended by Local Finance Notice CFO 96-13.

**5:30-5.7 General ledger accounting systems**

(a) All local units shall have and maintain a general ledger for at least the current fund. Nothing shall prohibit a local unit from maintaining a general ledger for other funds.

(b) The general ledger shall be the official permanent financial record of the local unit. It shall provide a summary of all financial transactions as they have been recorded in the books of original entry, using a double entry, self-balancing accounting system with the general ledger facilitating the preparation of the financial statements. The general ledger, together with the books of original entry and supporting subsidiary ledgers shall constitute the complete accounting system.

(c) The provisions of this section codify and continue the provisions of Technical Advisory Directive No. 3, issued in April of 1985 and effective January 1, 1986.

# LOCAL PUBLIC CONTRACTS LAW APPLICATION OF N.J.A.C. 5:30-11.1 ET SEQ.

## SUBCHAPTER 11. CHANGE ORDERS AND OPEN-END CONTRACTS

### 5:30-11.1 Application, compliance and penalties

(a) Unless specifically stated to the contrary, the rules in this subchapter apply to all local government agencies that are encompassed by the definition of contracting unit in N.J.S.A. 40A:11-2(1) by whatever name called, and referred to in this subchapter as contracting units.

(b) Every governing body and chief executive officer shall take all steps necessary so that all officials and employees shall be aware of and comply with the requirements of these rules.

### 5:30-11.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

*"Change order"* means a properly prepared document authorized by the governing body which directs and authorizes a vendor providing goods or performing services to a contracting unit pursuant to a contract awarded by governing body resolution to change the quantity or character of goods provided or services performed from that originally specified or estimated and to correspondingly change the payment due therefore.

*"Chief executive officer"* means the elected or appointed individual with the highest level of administrative authority of the contracting unit. In the case of a municipality, this may refer to the mayor as appropriate to the form of government; in the case of a county, the director of a board of chosen freeholders, county executive, or county manager as appropriate to the form of government; in the case of an authority, the chair of the authority; and, in the case of a fire district, the president or other presiding officer of the board of fire commissioners.

*"Open-end contracts"* means those contracts for which price bids were solicited on a unit basis because exact quantities needed were not known at the time bids were sought. Such contracts, when advertised and awarded, must include a minimum and a maximum number of units that can be ordered for each item under the contract. Zero is an acceptable minimum. Orders placed under such open-end contracts shall not be considered as change orders for purposes of this section, but shall be subject to the requirements specified in N.J.A.C. 5:30-11.10. Examples include, but are not limited to, blacktopping and office supplies such as stationery.

### 5:30-11.3 General requirements for all change orders

(a) No changes in quantities, work performed, services rendered, materials, supplies or equipment delivered or provided shall be authorized, permitted or accepted except by the procedures established herein. All change orders unless otherwise stated in this subchapter shall be subject to the following:

1. Each change order shall be in writing and shall be numbered consecutively (beginning with number one) and attached to the original purchase order or contract for each project.
2. Change orders which result in payment reduction below the originally contracted price may be made by locally established procedure, provided that any change orders increasing cost on the same contract shall include reference to such reductions.
3. Quantities of items or work shall not be changed in such a manner as to nullify the effect of the competitive determination of lowest responsible bidder which was made at the time of contract award, if at said time the changes could have been reasonably foreseen.
4. Responsibility required by these rules to be exercised specifically by the governing body, including authorization of change orders, shall not be delegated except for minor field (site) modifications pursuant to N.J.A.C. 5:30-11.4.
5. Change orders may be executed by the representative appointed by the governing body but the responsibility for the authorization of change orders shall not be delegated by the governing body except for minor field (site) modifications pursuant to N.J.A.C. 5:30-11.4.
6. Change orders shall be used to change the number of units or items originally advertised and contracted for, provided that:
  - i. Unit prices or a price methodology were sought in the original specifications and included in the contract;
  - ii. The original specification and the contract included a provision that the unit prices could be so used; and
  - iii. If (a)6i and ii above were not contained in the original specification, a change order shall not be issued.
7. Change orders shall not be used to substantially change the quality or character of the items or work to be provided, inasmuch as such would have been a determining factor in the original bidding.
8. Change orders shall not serve the purpose of escalation clauses and, therefore, shall not be utilized to effectuate upward price adjustments.
9. Total number of change orders executed for a particular contract shall not cause the originally awarded contract price to be exceeded by more than 20 percent unless otherwise authorized by these rules.
10. If proposed change orders do exceed the 20 percent limitation of (a)9 above, no work shall be performed or purchases made until the procedures of

N.J.A.C. 5:30-11.9 have been completed. If the governing body determines issuance of the change order is not justifiable, a new contract shall be executed in accordance with the Local Public Contracts Law.

11. Before authorizing any change orders resulting in additional expenditures, the availability of funds shall be certified in writing by the chief financial officer or certifying finance officer, as appropriate.
12. The 20 percent limitation of (a)9 above shall not apply to emergency situations as defined within N.J.S.A. 40A:11-6.
13. Change order authorizations shall not be withheld until the completion of the entire project.

#### **5:30-11.4 Procedures for minor field (site) modifications**

The governing body shall be required to authorize all change orders, except that minor field (site) modifications (for example, additional fill stone needed, modifications of footings, additional rock blasting) may be authorized, provided that they do not affect the overall scope of work of the contract, by the designated representative of the governing body. These change orders shall result only in minor price increases to the originally awarded contract price.

#### **5:30-11.5 General procedures for change orders**

- (a) The governing body approval process for change orders shall be as follows:
  1. The chief executive officer of the contracting unit or his or her designee shall file with the governing body a request for the change order, stating the facts involved and indicating that the proposed change order may be allowed under these rules. If the request and justification are prepared by other than an official of the contracting unit, they must be countersigned by the chief executive officer or his or her designee.
  2. The governing body shall take such steps as it may find appropriate to assure that a change is necessary and that the work will be completed.
  3. The governing body shall then pass a resolution authorizing a written amendment to a contract covering the change(s) to be made. The exact form of this amendatory contract shall be at the discretion of the contracting unit attorney.
  4. The resolution described in (a)3 above shall be passed before execution of the change order. No work shall be performed or purchases made on the involved phase of the contract until the resolution is passed.

**5:30-11.6 Change orders for professional services and extraordinary unspecifiable services**

- (a) This section shall apply only to change orders for professional and extraordinary, unspecifiable services contracts.
- (b) In case of conflict with the general requirements of N.J.A.C. 5:30- 11.3, the specific language of this section shall prevail but, otherwise, the requirements of N.J.A.C. 5:30-11.3 shall be satisfied.
- (c) Changes should be within the scope of activities of the original contract, and not for the purpose of undertaking new or different work or projects. Changes in payments for activities within the scope of activities of the contract shall be in accordance with a schedule of specific charges or rates contained in the contract and shall be effectuated by a written change order authorized by the governing body. If such a schedule is not included in the contract, the contract should be amended to provide for same.
- (d) The 20 percent limitation of N.J.A.C. 5:30-11.3(a)9 shall not apply to professional and consultant contracts.
- (e) If the change is not within the scope of activities of the original contract and the contract was awarded without competitive bidding being required by law or rule, as is the case for professional services and certain authorized extraordinary unspecifiable services in accordance with N.J.S.A. 40A:11-5(1)(a)(i), any change beyond the original scope of activities shall be made by amendatory contract approved by the governing body.

**5:30-11.7 Change orders for materials, supplies and equipment which are part of construction contract**

- (a) The requirements of this section shall apply only to change orders for materials, supplies and equipment which are part of construction contracts.
- (b) In case of conflict with the general requirements of N.J.A.C. 5:30- 11.3, the specific language of this section shall prevail but, otherwise, the requirements of N.J.A.C. 5:30-11.3 shall be satisfied.
- (c) Change orders for materials, supplies and equipment items which are part of a contract which is primarily a construction contract shall be processed in accordance with the rules governing construction contracts. Contracts awarded on a unit price basis (including, but not limited to, asphalt overlays, curbing) as an open-end contract shall be handled under the section dealing with open-end contracts. However, contracts awarded for the paving, construction or reconstruction of specifically described streets, parking lots, or sections shall be treated as construction contracts.

**5:30-11.8 Change orders for construction, reconstruction and major repair contracts**

- (a) The requirements of this section shall apply only to the particular type of contract in question.

(b) In case of conflict with the general requirements of N.J.A.C. 5:30- 11.3, the specific language of this section shall prevail but, otherwise, the requirements of N.J.A.C. 5:30-11.3 shall be satisfied.

(c) Change orders for construction, reconstruction and major repair contracts shall be limited to the following types:

1. Unforeseeable problems, which are defined as conditions or circumstances that could not be foreseen at the time the specifications were written and the contract awarded; provided that a substantial amount of the construction would be delayed, which would result in substantial increases in costs above the original contract amount or substantial inconvenience to the public if bidding were to be required; and
2. Minor modifications to effect economies, improve service or resolve minor problems with affected property owners.

(d) Change orders for construction, reconstruction and major repair contracts shall not be made for the following:

1. Changes that materially expand upon the size, nature or scope of the project as it was originally described in the bid specifications; or
2. Extra work that could reasonably be effectuated by a separately bid contract without unduly disrupting the basic work or imposing adverse cost consequences.

### **5:30-11.9 Procedures for change orders which exceed 20 percent limitation**

(a) General provisions regarding the procedures for change orders which exceed the 20 percent limitation are as follows:

1. The procedures in this section shall only be followed when a particular change order on any type of contract, except professional and extraordinary unspecifiable service contracts, will cause the total amount of change orders executed for the particular contract to exceed the originally awarded contract price by more than 20 percent. The purpose of the procedures is to allow for such a change only in limited instances. Such a change shall not be permitted when the factual circumstances make it reasonably possible to execute a new contract for the additional work. Such a change may be allowed, for example, when an unforeseen circumstance or differing site condition is combined with a situation which renders execution of a new contract an unreasonable interference with the efficient completion of the work.
2. Generally such change orders are not justifiable and the ready issuance of them by contracting units would constitute an abuse of these rules.

(b) A written certification justifying the performance of the work or the furnishing of the services which would necessitate issuance of such a change order shall be filed by the contractor with the chief executive officer or designee. This certification shall include an



explanation of the factual circumstances which necessitate issuance of the change order; a statement indicating why these circumstances could not have been foreseen; a statement indicating why issuance of the change order would be in the best interests of the contracting unit and would not constitute an abuse of these rules; and, if the nature of the change order is technical, the certification shall include a certified statement from the contractor's appropriate expert, such as an engineer or architect. This statement shall explain in detail the factual circumstances which necessitate issuance of the proposed change order. A rewrite or paraphrase of the rules in this subchapter is not acceptable.

(c) The governing body approval process for change orders which exceed the 20 percent limitation is as follows:

1. The chief executive officer or his or her designee shall file a request for the change order with the governing body. This request shall include a statement indicating why the proposed change may be allowed under this subchapter. A copy of the certification required under (b) above must also be attached to the request.
2. If the certification required pursuant to (b) above includes a certified statement from an engineer or other expert as required by (b) above, the request to the governing body shall also include a statement from the contracting unit's engineer or an official or employee with the appropriate expertise. This statement shall explain in detail the factual circumstances which justify issuance of the proposed change order. A rewrite or paraphrase of the rules in this subchapter is not acceptable.
3. The governing body shall take appropriate steps to assure that the change order is proper and allowable under this subchapter.
4. The governing body shall then pass a resolution authorizing a written amendatory contract to be entered into covering the change(s) to be made. The exact form of this amendatory contract shall be at the discretion of the contracting unit attorney.
5. The resolution described in (c)4 above shall be passed before execution of the change order.
6. The governing body shall cause to be printed once, in an official newspaper, a brief notice indicating the additional amount to be expended, the original contract price, the nature of the original and additional work and why it is necessary to expend the additional funds. A copy of the advertisement shall also be filed with the clerk or secretary of the governing body and be available for inspection by the public.

(d) The clerk or secretary of the governing body of each contracting unit shall report to the Director on an appendix to the contracting unit's annual budget all change orders from the previous fiscal year which exceeded the 20 percent limitation. This report shall be made on a form provided by the Director. A summary of the report shall be included as supplemental material in the annual audit of the contracting unit.

### **5:30-11.10 Open-end contracts**

(a) The issuance of purchase orders pursuant to an open-end contract shall be considered to be the carrying out of the contract and not a change order. The following requirements shall apply:

1. Purchase orders under open-end contracts shall not be used for purposes such as changing the quality or character of items to be provided, nor to exceed the maximum number(s) of items or units provided for in the original specifications and contract. Such changes would constitute a change order.
2. Each time a purchase order is placed, the contracting agent shall ensure that funds are available for the purchase through either an encumbrance or certification of availability of funds.
3. Purchase orders shall be placed by the contracting agent, subject to such controls or approval requirements as the governing body, chief executive or other administrative officer may lawfully impose.